Supreme Court, U.S
FILED

01 123 JUL 20 2001

OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

JSG TRADING CORPORATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT M. ADLER
JOHN M. HIMMELBERG
O'CONNOR & HANNAN, L.L.P.
1666 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 887-1400

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
JOAN M. MACAULAY
SIDLEY AUSTIN BROWN & WOOD
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

July 20, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

121PP

QUESTION PRESENTED

Whether commercial bribery, a violation of section 2(4) of the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. §§ 499a *et seq.*, may be demonstrated simply by proof of payments intended to induce sales of which the employer or principal is not fully aware, given the language of the Act, this Court's decision in *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999), and prior agency interpretations of section 2(4).

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were respondents but not appellants below: Gloria and Tony Enterprises d/b/a G&T Enterprises, Albert Lomoriello, Jr. d/b/a Hunts Point Produce Co., and Anthony Gentile.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner declares that the parties have no parent companies or nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. Industry And Statutory Background	2
B. The USDA's Proceedings Against Petitioner	7
1. Checks To Anthony Gentile	9
2. Stock Purchase From Gloria Gentile	11
3. Payments To Albert Lomoriello	11
4. Payment To Gloria Gentile	12
C. The Decision Below	12
REASONS FOR GRANTING THE PETITION	14
I. THE DECISION BELOW EVISCERATES THE PACA AMENDMENTS OF 1995 AND HAS AN IMMEDIATE AND DAMAGING EFFECT ON A SIGNIFICANT INDUSTRY	15
II. THE DECISION BELOW IS IRRECONCILABLE WITH THE STATUTORY LANGUAGE CREATING ENFORCEABLE DUTIES UNDER PACA, AGENCY PRECEDENT, AND WITH A RECENT DECISION OF THIS COURT	23

TABLE OF CONTENTS – continued

Page

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Page

Greater Boston Television Corp. v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970) 28
JSG Trading Corp. v. *USDA*, 176 F.3d 536 (D.C. Cir. 1999) 8
Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) 28
NLRB v. *Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 264 (1974) 19
Service v. *Dulles*, 354 U.S. 363 (1957) 17
United States v. *Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999) 14, 23, 24, 25, 27
Vitarelli v. *Seaton*, 359 U.S. 535 (1959) 17

STATUTES AND REGULATIONS

PACA Amendments of 1995, Pub. L. 104-48, 109 Stat. 424 ..... 7, 14
7 U.S.C. §§ 499a *et seq.*, ... 2, 3, 6
§ 499a(b)(13) 7, 16, 19
§ 499b(4) ..... *passim*
§ 499c 6
§ 499h 6
18 U.S.C. § 201 ..... 24, 27
Ariz. Rev. Stat. § 13-2605 27
Cal. Penal Code § 641.3 27
Colo. Rev. Stat. § 18-5-401 27
Fla. Stat. ch. 838.16 27
720 Ill. Comp. Stat. 5/29A-1 27
N.J. Stat. Ann. § 2C:21-10(a) 27
18 Pa. Cons. Stat. Ann. § 4108 27
Tex. Penal Code Ann. § 32.43 27
7 C.F.R. § 46.2(hh) 17, 18

TABLE OF AUTHORITIES – continued

Page

Amendments to the Perishable Agricultural Commodities Act (PACA), 62 Fed. Reg. 15083 (Mar. 31, 1997) 17

ADMINISTRATIVE DECISIONS

Flanagan & Jones, Inc. v. *World Wide Consultants, Inc.*, 53 Agric. Dec. 828 (1994) 27
JSG Trading Corp., 56 Agric. Dec. 1800 (1997) ... 8
JSG Trading Corp., 57 Agric. Dec. 640 (1998) 8
JSG Trading Corp., 57 Agric. Dec. 710 (1998) 8
Rich-Seapak Corp. v. *Pro-Ag, Inc.*, 56 Agric. Dec. 1958 (1997) 26
Salinas Lettuce Farmers Coop., 50 Agric. Dec. 984 (1991) 27
Sid Goodman & Co., 49 Agric. Dec. 1169 (1990), *aff'd*, 945 F.2d 398 (4th Cir. 1991) 6
Tipco, Inc., 50 Agric. Dec. 871 (1991), *aff'd*, 953 F.2d 639 (4th Cir. 1992) 7

LEGISLATIVE HISTORY

H.R. Rep. No. 71-1041 (1930) 6
H.R. Rep. No. 104-207 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453 7

OTHER AUTHORITIES

Model Penal Code § 224.8 27
Argicultural Mktg. Serv., U.S. Dep't of Agric., *PACA Fact Finder*, *available at* http://www.ams.usda.gov/fvpaca/FactFinder.htm (last revised Apr. 2000) 3, 5
Economic Research Serv., U.S. Dep't of Agric., Agric. Econ. Rep. No. 795, *U.S. Fresh Fruit and Vegetable Marketing: Emerging Trade Practices, Trends, and Issues* (Jan. 2001) 5, 6

IN THE

Supreme Court of the United States

No. 01-

JSG TRADING CORPORATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

JSG Trading Corp. ("JSG") hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Judicial Officer of the United States Department of Agriculture is reported at 58 Agric. Dec. 1041 (1999). Pet. App. 16a-82a. The opinion of the court of appeals is reported at 235 F.3d 608 (D.C. Cir. 2001). Pet. App. 1a-15a. The orders of the court of appeals denying the petition for rehearing and suggestion for rehearing en banc were entered on March 22, 2001, and are not reported. Pet. App. 83a, 84a.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2001. A petition for rehearing and suggestion for rehearing *en banc* was denied on March 22, 2001. The Chief Justice granted Petitioner's Application for Extension of Time on May 21, 2001, granting an extension up to and including July 20, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this case is the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. §§ 499a *et seq.*, section 2(4), 7 U.S.C. § 499b(4). Section 2(4) provides, in pertinent part:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> . . . .
>
> (4) . . . to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction. . . . However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

STATEMENT OF THE CASE

A. Industry And Statutory Background.

This case concerns an issue critical to the $100 billion perishable agricultural commodities industry. The United States Department of Agriculture ("USDA") has characterized this industry as "unique" because "[d]ealers handle a product that is very perishable"; thus, "a 1- or 2-day delay in marketing can mean the difference between profit

and loss." Agricultural Mktg. Serv., U.S. Dep't of Agric., *PACA Fact Finder*, *available at* http://www.ams.usda.gov/fvpaca/FactFinder.htm (last revised Apr. 2000) (hereinafter "*PACA Fact Finder*"). Produce, once harvested, begins to deteriorate rapidly and must reach the ultimate consumer within a very short period of time. Bringing a shipment of produce to market involves multiple highly-decentralized transactions between farmers, shippers, brokers, repackers, wholesalers, and retailers or institutional purchasers. Many transactions in this chain are never reduced to writing, and deals are often struck over the telephone and supported by meager documentation. Promotional payments, rebates and allowances are standard practices for promoting sales within the industry, and are often essential to move shipments as the produce ripens and the risk of loss intensifies. Longstanding business relationships and risk-spreading arrangements also play vital roles in eliminating some measure of risk within the industry. Federal regulation has been generally stable and predictable since Congress passed the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. §§ 499a *et seq.* ("PACA" or the "Act"). Specific federal duties and prohibitions are prescribed in the Act and the regulations, and all duties enforceable under PACA not specified in either source are defined, under longstanding USDA precedent, by state law. In 1995, in recognition of established industry practice, Congress amended PACA to make absolutely clear that "the good faith offer, solicitation, payment, or receipt of collateral fees and expenses" to promote sales is lawful. See 7 U.S.C. § 499b(4).

The decision below has destroyed settled expectations within the industry and fostered widespread uncertainty about whether everyday and necessary business practices in this industry previously understood to be completely legitimate are now illegal and may result in the revocation of one's license to trade in these commodities. The Judicial Officer of the USDA has created out of whole cloth (and the court of

appeals has blessed) an implied federal rule of commercial bribery that makes illegal under PACA any nontrivial payment to a buyer to induce the purchase of produce if the buyer's employer or principal is not "fully aware" of the payment – regardless of whether the payment is made in good faith, linked to any specific transaction, or whether any *quid pro quo* exists.

The USDA's new commercial bribery rule eviscerates the 1995 statutory protection for good faith collateral fees and expenses – all of which by definition are intended to induce the purchase of produce. It violates the express statutory requirement that the only breaches of duty prohibited by PACA are those "in connection with" a specific "transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce." 7 U.S.C. § 499b(4). It contravenes longstanding USDA precedent that duties not expressly set forth in the statute or agency regulations are determined by state law, and disregards the widely varying standards of commercial bribery among the states. It is not only patently unlawful, but also unworkable in this industry, in which buyers and brokers purchase produce on behalf of many different customers, making it very difficult to identify the customer that must be made "fully aware." That difficulty is compounded by the fact that promotional deals are cut on the fly by agents of buyers and sellers for particular truckloads of produce, often in the early morning hours prior to markets opening, in circumstances in which "full awareness" of every payment by absent and/or unknown principals is a sheer impossibility. The unprecedented federal commercial bribery standard minted by the USDA is destructively arbitrary and unlawful agency action, and this Court should intervene to vindicate the careful regulatory scheme crafted by Congress and to prevent the injustice and industry disorder that the decision below creates.

1. The fresh produce industry is unique within the commodities industries. Unlike other commodities industries,

the $100 billion fresh produce industry carries an unusually high level of risk because of the rapid perishability of the goods. See *PACA Fact Finder*. Because the passage of a few days can cause significant deterioration, fresh produce must be harvested, packed, shipped, and sold to consumers as quickly as possible. See *id.* Several parties are involved in bringing produce from the farm to the consumer, including buyers, shippers, brokers, repackers, wholesalers, and retailers. The participation of each of these parties significantly increases the risk of delay, which can turn an otherwise valuable shipment of produce into a total loss. Speed and efficiency are therefore critical to avoiding losses and are required to a degree not typically present in most other industries that deal in non-perishable goods. Moreover, given the distressed-sale position of buyers and sellers of these highly perishable goods, establishing good relationships with trustworthy and reliable customers and suppliers is a vital way to eliminate some measure of risk in this unusually precarious industry.

Given the acute vulnerability of all parties dealing in these highly perishable goods, shippers seeking to sell produce to retailers, wholesalers, and other buyers are frequently required to provide incentives to enhance efficiency in moving the produce from the farm to the consumer without costly delays and to gain other competitive advantages. These include volume incentives, promotional discounts, rebates, price reductions to mitigate losses, repurchases of unsold produce, and other off-invoice arrangements, many of which are structured as per-carton price reductions. See Economic Research Serv., U.S. Dep't of Agric., Agric. Econ. Rep. No. 795, *U.S. Fresh Fruit and Vegetable Marketing: Emerging Trade Practices, Trends, and Issues* 1, 25-27 (Jan. 2001). As reported by the USDA's Economic Research Service in its recent study of trade practices within the produce industry, "price may be just one component of a more complicated sales arrangement that might also specify

quality characteristics; payment of off-invoice fees such as promotional fees, rebates, or other discounts; [and] volume commitments." See *id.* at 1. Although firms may be able to mitigate the costs of paying these fees by negotiating invoice adjustments with the buyer, the majority of shippers recently surveyed by the USDA report paying fees that are not included on an invoice. See *id.* at 25-31.

2. The Perishable Agricultural Commodities Act of 1930, 7 U.S.C. §§ 499a *et seq.*, was enacted to ensure business integrity and eliminate unfair trade practices within the perishable agricultural commodities industry. See H.R. Rep. No. 71-1041, at 1 (1930). PACA requires all produce commission merchants, dealers, and brokers to be licensed, and contains specific prohibitions against unfair, deceptive, and unreasonable trade practices that are enforced by penalties including suspension, or in the case of flagrant or repeated violations, revocation, of the entity's PACA license. See 7 U.S.C. §§ 499c, 499h. Section 2(4) sets forth various unfair trade practices including, among other things, the failure to perform any duty in connection with any transaction under PACA:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> . . . .
>
> (4) . . . to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction. . . .

7 U.S.C. § 499b(4). Under this inherently amorphous standard, the USDA has held that section 2(4) prohibits commercial bribery. See *Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1184-86 (1990) (produce dealer's surreptitious payment of kickbacks to the produce buyers of two supermarkets to induce them to buy from him, without their employers' knowledge, is commercial bribery and constitutes an unfair

trade practice in violation of section 2(4)), *aff'd*, 945 F.2d 398 (4th Cir. 1991) (per curiam) (table); see also *Tipco, Inc.*, 50 Agric. Dec. 871, 882-85 (1991) (same), *aff'd*, 953 F.2d 639 (4th Cir. 1992) (per curiam) (table).

In 1995, after *Goodman* and *Tipco* were decided, Congress passed the PACA Amendments of 1995, Pub. L. No. 104-48, § 9, 109 Stat. 424, 429-30 ("PACA Amendments"), which makes clear that good faith collateral fees and expenses are lawful under this section. See 7 U.S.C. §§ 499b(4), 499a(b)(13). Section 2(4) was amended by adding:

> However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

Id. § 449b(4). The term "collateral fees and expenses" is defined as "any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity." *Id.* § 499a(b)(13). The Committee Report accompanying this legislation indicates that this amendment "establishes clarification of the status of collateral fees and expenses," noting that collateral fees "are fees considered separate from invoice fees" and are "lawful in and of [themselves]." H.R. Rep. No. 104-207, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 459.

B. The USDA's Proceedings Against Petitioner.

Petitioner JSG Trading Corp. ("JSG") is a New Jersey corporation licensed under PACA and is engaged in the business of shipping and selling produce. A substantial percentage of JSG's revenues comes from its sales of tomatoes. During the period relevant to this case, JSG sold tomatoes to various produce buyers, including Anthony Gentile, on behalf of L&P Fruit Corp. ("L&P"), and Albert Lomoriello ("Lomoriello"), on behalf of American Banana Co., Inc. ("American Banana"). Anthony Gentile and

Lomoriello were independent agents and purchased produce for L&P and American Banana, respectively, as well as for many other customers. In 1993, JSG's transactions with Lomoriello, Anthony Gentile, and his wife, Gloria Gentile, became the subject of a section 2(4) investigation by the USDA.

The USDA filed a complaint in November 1993 and an amended complaint in April 1994 with the Fruit and Vegetable Program of the USDA's Agricultural Marketing Service, alleging that JSG had made unlawful payments to Anthony Gentile and Lomoriello to induce them to purchase tomatoes from JSG. At the conclusion of the hearing, the Administrative Law Judge ("ALJ") found that JSG gave gifts and/or made payments to Anthony Gentile and Lomoriello while they served as buyers for their respective produce companies, and because the gifts and payments were more than *de minimis*, they constituted commercial bribes within the meaning of section 2(4) of PACA. *JSG Trading Corp.*, 56 Agric. Dec. 1800, 1813 (1997). Finding the violations to be willful, flagrant, and repeated, the ALJ revoked JSG's PACA license. *Id.* at 1836-37. The decision was adopted and affirmed on appeal to the Judicial Officer of the USDA, *JSG Trading Corp.*, 57 Agric. Dec. 640 (1998), and JSG's Motion for Reconsideration was denied, *JSG Trading Corp.*, 57 Agric. Dec. 710 (1998). The court of appeals reversed, holding that the Judicial Officer had created an impermissible *per se* standard for commercial bribery within section 2(4) of PACA that failed to follow agency precedent. The court of appeals remanded the case to the Judicial Officer either to justify his departure from agency precedent or to apply the correct standard and make specific factual findings to support his ruling. *JSG Trading Corp.* v. *United States Dep't of Agric.*, 176 F.3d 536, 546-47 (D.C. Cir. 1999).

On remand, JSG moved to reopen the record to present further evidence relevant to whatever new standards the Judicial Officer might adopt. The Judicial Officer denied the

motion and simultaneously issued a decision finding that JSG committed "commercial bribery," and again revoked JSG's license. Pet. App. 16a-82a. The commercial bribery standard applied by the Judicial Officer created a rebuttable presumption of commercial bribery where:

> (1) a commission merchant, dealer, or broker made a payment to or offered to pay a purchasing agent; (2) the value of the payment or offer was more than *de minimis*; (3) the payment or offer was intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; and (4) the purchasing agent's principal or employer was not fully aware of the payment or offer.

Id. at 28a. The Judicial Officer acknowledged that many of the challenged items that JSG or its founder and exclusive tomato dealer, Steven Goodman ("Goodman"), gave to Anthony Gentile – who was also Goodman's mentor in the produce industry, long-time friend, and partner in a separate trucking business – were not actually bribes. Nonetheless, the Judicial Officer determined that the following four sets of transactions constituted commercial bribery under its newly-minted PACA standard embodied in section 2(4):

1. Checks To Anthony Gentile.

The USDA challenged 35 transactions with L&P in which JSG made retroactive price adjustments at the request of L&P's owner. As representatives of JSG and L&P testified at the hearing, from time to time, L&P sold produce purchased from JSG at a loss. As an accommodation to L&P, as well as to another customer who made a similar request, JSG agreed to retroactive price adjustments for these shipments to mitigate L&P's losses, which JSG then recouped on later transactions by charging a specified mark-up on each box sold. This allowed L&P to hedge by avoiding a loss on certain transactions in exchange for forgoing some of the

profit on subsequent transactions, and also enabled JSG to maintain a good relationship with a long-term customer and provided JSG with some assurance of a future outlet for sales in this highly competitive market. Representatives of JSG explained that JSG recorded these discounts as "shared commissions" in its ledger, because the discounts were financed out of Goodman's personal commissions, although some of them were also recorded in the "loans and exchanges" account of L&P. The amount of the mark-up was then recorded on the files for each of the subsequent transactions so that it could be monitored until the discount was fully recouped. Upon recoupment of the discount, a check was written to the order of Anthony Gentile, as L&P's buyer, to indicate both the amount of the discount and that it had been fully satisfied, and then placed into the file. The checks simply served the function of allowing JSG to reconcile its books and permitted Goodman to calculate his commissions. Accordingly, the checks never left JSG's accounts and were never given to Anthony Gentile or L&P, nor did Anthony Gentile ever receive any of the underlying funds.

The Judicial Officer noted that the 35 checks never left JSG and was therefore unable to make a finding that Anthony Gentile was paid or received any money from these checks. Nonetheless, despite the absence of any specific loan to Anthony Gentile recorded in JSG's books, the Judicial Officer concluded that the 16 checks listed as "loans" reflected some loan from JSG to Anthony Gentile, rather than to L&P, and the per-box mark-up could be considered a kickback to reduce Anthony Gentile's indebtedness on this loan, thereby conferring a financial benefit on him. Similarly, while not finding that Anthony Gentile actually received any part of Goodman's commissions on the L&P transactions, the Judicial Officer held that because all 35 checks were listed as "shared commissions" on JSG's books, Anthony Gentile

somehow should be deemed to have received part of Goodman's commissions on the sales.

2. Stock Purchase From Gloria Gentile.

The USDA also challenged a stock transaction in which Goodman purchased Gloria Gentile's shares of stock in a company jointly established by Goodman and Anthony Gentile. This transaction was memorialized in a detailed contract drawn up by an attorney, and specified payments in installments over a period of two years. Goodman paid Gloria Gentile the entire contract amount out of his L&P commissions, subject to the annual limits set out in the contract. The Judicial Officer found, despite the absence of any valuation evidence (either at the time of contracting or the time of the hearing) or evidence demonstrating that the parties understood that the sale price exceeded market value, that Gloria Gentile's profit on the stock sale was unjustified because the company was never profitable. He concluded that the profit therefore was a commercial bribe intended to induce her husband, Anthony Gentile, to buy from JSG, especially since Gloria Gentile was paid out of Goodman's L&P commissions. The Judicial Officer did not acknowledge that even the portion of the sale price recapturing Anthony Gentile's equity contributions, not just the profit, was also paid out of Goodman's commissions, much less justify his conclusions in light of that relevant fact.

3. Payments To Albert Lomoriello.

The USDA also challenged seven payments by JSG to Lomoriello. As JSG's representative and Lomoriello testified at the hearing, Lomoriello, who was physically present at the produce market at which many of JSG's customers were located, provided various delivery, collection, and pricing services to JSG at that market. JSG's representative testified that these payments were compensation for those services. However, the Judicial Officer found that the payments to Lomoriello were commercial bribes rather than compensation

for services provided by Lomoriello, because the money was deducted out of JSG's profits on American Banana transactions. The Judicial Officer noted that Lomoriello had no written contract specifying his services and compensation.

4. Payment To Gloria Gentile.

Finally, the USDA challenged one payment to Gloria Gentile, through her company, Gloria & Tony Enterprises. Gloria Gentile and JSG's representative testified that the payment was compensation for inspecting tomato fields and reporting her findings to JSG. The USDA never sought to link this payment to any specific transaction. The Judicial Officer rejected the explanation that the check to Gloria Gentile was compensation for her services, and found that the payment was yet another commercial bribe to induce her husband, Anthony Gentile, to buy from JSG, because she never formalized her one-time arrangement to provide inspection services into a written contract.

C. The Decision Below.

JSG again appealed, contending that the Judicial Officer's commercial bribery standard was still incorrect because it failed to require a *quid pro quo* and specific intent to corrupt the agent's buying decision, and improperly imposed a stringent and unprecedented requirement of "full awareness" of the payment by the employer. A completely different panel than the one that heard the first appeal upheld the Department's decision.

Declaring that "it is the Department's function, not ours, to define offenses" under section 2(4) of PACA, the court of appeals limited its review to whether the USDA's new standard "is reasonable" and whether the USDA "either follow[ed] its prior constructions of the statute or articulate[d] a reasoned justification for departing." Pet. App. 10a n.8. Accordingly, the court paid no heed to the statutory language and industry context, and upheld the new commercial bribery standard simply because it found it to be consistent with the

USDA's prior decisions in *Goodman* and *Tipco*. *Id.* at 7a. The court dismissed JSG's contentions concerning intent to induce, noting that "[i]n both *Goodman* and *Tipco*, a generalized intent by the payer to induce purchase of its product satisfied the intent element." *Id.* The court of appeals refused to adopt a requirement of "corrupt intent" typically required for bribery, reasoning only that "*Goodman* and *Tipco* say nothing of specific corrupt intent." *Id.* at 8a. The court of appeals likewise rejected JSG's challenge to the unprecedented "full awareness" requirement on the grounds that "[t]he secrecy element in *Goodman* and *Tipco* contemplates a sufficiently high level of awareness by the payee's employer or principal to justify the Judicial Officer's insistence on 'full awareness.'" *Id.* The court acknowledged that even social hospitality and sales incentives could constitute commercial bribes under the Judicial Officer's standard, but found it sufficient that not all such activities would be prohibited. "Social hospitality – for example, taking a friend who happens to be a purchasing agent to dinner – would be protected if the host lacked the intent to induce purchase of its products (or, if it had such intent, informed the agent's principal)." *Id.* at 10a-11a. Further, "sales incentives offered to a purchasing agent are perfectly legal . . . if the agent's principal is informed of the transaction." *Id.* at 11a.

In addition, the court held that the USDA's standard for commercial bribery would not offend the protections for good faith collateral fees and expenses under section 2(4). The court held that the "secrecy element" of the standard (*i.e.* the requirement of full awareness by the principal) would distinguish protected good faith collateral fees and expenses from unprotected bribes, declaring that such "[p]romotional allowances, rebates and the like are typically given with the buyer's knowledge." Pet. App. 11a. Moreover, it held that the transactions at issue were also unprotected under the collateral fees and expenses exception because they were not

made in good faith, noting that "good faith" within the meaning of section 2(4) excludes payments made in secret with intent to induce. *Id.*[1] Finally, the court held that neither *Goodman* and *Tipco*, nor federal cases interpreting criminal bribery statutes, require a *quid pro quo* to establish commercial bribery under section 2(4). *Id.* at 9a-10a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision sets a dangerous precedent for commercial bribery, raising issues of compelling importance that will affect routine business transactions among the approximately 15,700 PACA licensees and thousands of other participants of the more than $100 billion produce industry. The court's exceedingly broad interpretation of section 2(4) of PACA eliminates the distinction between commercial bribes and legitimate promotional and marketing activities, thwarting the express protections of the PACA Amendments of 1995, Pub. L. No. 104-48, § 9, 109 Stat. 424, 429-30, which made clear that good faith collateral fees and expenses, including promotional and marketing fees and payments, are protected. The court of appeals erroneously interpreted "collateral fees and expenses" and "good faith" to include *only* collateral fees and expenses of which the employer is fully aware, and in doing so, permitted the agency to disregard its own regulation that specifies the precise, narrow circumstances under which disclosure to the employer is required. In addition, the court contradicted both the express language of the statute and the reasoning of this Court in *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999), by rejecting the requirement

---

[1] The court of appeals ruled that the transactions at issue were not protected collateral fees and expenses under section 2(4), despite the fact that the Judicial Officer had specifically declined to make a finding as to whether the transactions were protected collateral fees and expenses within the meaning of that section. Pet. App. 77a-78a.

of a nexus to a particular PACA transaction, and instead defined commercial bribery broadly to include activities designed simply to create business goodwill.

If the court of appeals' decision is allowed to stand, the protections Congress intended for collateral fees and expenses have been rendered meaningless. Indeed, they are now a trap for the unwary. This critically threatens the normal course of business within this industry and jeopardizes the positions of buyers, sellers, and brokers who depend on collateral fees and expenses to promote sales, mitigate risk, and avoid losses. This Court's review is necessary to correct the court of appeals' erroneous and unwarranted expansion of commercial bribery in a vital segment of the nation's economy.

I. THE DECISION BELOW EVISCERATES THE PACA AMENDMENTS OF 1995 AND HAS AN IMMEDIATE AND DAMAGING EFFECT ON A SIGNIFICANT INDUSTRY.

A. After the USDA issued its companion decisions in *Goodman* and *Tipco*, holding that a seller's surreptitious kickbacks to produce buyers in exchange for purchases were unlawful under section 2(4), Congress enacted the PACA Amendments to make clear that good faith collateral fees and expenses, including promotional and marketing fees and expenses, rebates, discounts, and allowances, are fully protected. These Amendments recognized the legitimacy of the unique course of dealing that has developed within the industry to mitigate the significant risk created by these highly perishable goods, and that the payment of fees and expenses beyond the invoice price is necessary to facilitate fast-paced, highly-decentralized transactions and enhance the movement of produce from farm to market before the shipments deteriorate and lose their value. Contrary to the court of appeals' blanket assertion that Congress only intended to protect those payments of which the employer was "fully aware," the protections for collateral fees and expenses extended to *all* such payments, whether made

"directly or indirectly" in connection with a transaction, provided the payments are made in good faith. Rather than review the agency's decision in light of Congress's clear mandate in the PACA Amendments, the court of appeals engaged in a simplistic review of the Judicial Officer's decision for the sole purpose of ensuring fidelity to two prior agency decisions that predated the PACA Amendments by four years. In doing so, the court of appeals substituted its own standards for those enacted by Congress, and created a rule that so significantly qualifies the express protections for collateral fees and expenses as to eliminate them altogether.

The court of appeals made two serious errors in interpreting the PACA Amendments that have serious consequences within this important industry. First, the court interpreted the term "collateral fees and expenses" to categorically *exclude* all "promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity," see 7 U.S.C. § 499a(b)(13), of which the buyer's employer was not fully aware:

> The secrecy element in particular also distinguishes the transactions at issue from a category of promotional activities recognized as legitimate by PACA. . . . JSG's payments to Anthony and Gloria Gentile and Albert Lomoriello do not fall within this category. Promotional allowances, rebates, and the like are typically given with the buyer's knowledge rather than secretly directed to the buyer's agents or employees.

Pet. App. 11a. The court's interpretation of "collateral fees and expenses" is clearly wrong, because nothing in section 2(4) or anywhere else in PACA or its regulations distinguishes among collateral fees and expenses on the basis of the employer's awareness of them. Because there is no basis in PACA or its regulations to conclude that the employer's awareness has any relevance as to whether a

particular payment is a collateral fee or expense, the court failed to cite any authority in support of this proposition.

The fallacy of the court's new requirement of "full awareness" by the employer is made clear by the requirement in USDA's own regulations that collateral fees be disclosed if they "affect a material term of the agreement." See 7 C.F.R. § 46.2(hh). If the term "collateral fees and expenses" included an overarching "full awareness" requirement, this regulation specifying when disclosure must be made would be entirely superfluous, as no disclosure of collateral fees and expenses would be required if the employer is already fully aware of them. This is even more clear in light of the agency's comments during rulemaking. When the agency issued this regulation as a final rule, it considered certain comments from a trade association that included a petition that had been previously submitted "requesting that a notice and comment proceeding be undertaken in order to formulate a statement of general policy regarding the disclosure to customers of promotional allowances, rebates, and collateral fees." See Amendments to the Perishable Agricultural Commodities Act (PACA), 62 Fed. Reg. 15083, 15084 (Mar. 31, 1997) (codified at 7 C.F.R. pt. 46). The agency responded to that comment by stating that "[t]he 'policy statement' or additional clarification sought by [the petitioner] appears in this final rule at section 46.2(hh), the definition of 'good faith,' that requires the disclosure of such fees when they affect a material term of the agreement." See *id.* The circumstances under which disclosure is required could not be more clear. However, the USDA ignored the disclosure requirement set out in its own regulation and instead imposed an all-encompassing disclosure requirement on *all* collateral fees and expenses, which was affirmed by the court of appeals. It is beyond dispute that an agency cannot disregard its own regulations. *Vitarelli* v. *Seaton*, 359 U.S. 535, 539-40 (1959); *Service* v. *Dulles*, 354 U.S. 363, 388 (1957).

The court further erred in holding that collateral fees and expenses are not made in "good faith" within the meaning of section 2(4) if they are made with intent to induce and the employer is not fully aware of them:

> JSG's payments also lack the requisite good faith, which Department regulations define as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." 7 C.F.R. § 46.2(hh). No reasonable conception of honesty or fair dealing includes secret payments designed to corrupt a produce buyer's agents or employees.

Pet. App. 11a. The court defines "good faith" in a way that both ignores the natural and clear purpose underlying *all* promotional activities and again conflicts with the agency's own regulation. Promotional and marketing activities, by definition, are designed to induce sales. Thus, it is inherently illogical to define "good faith" in connection with promotional and marketing activity to *exclude* activity designed to induce sales, because that interpretation would exclude every conceivable type of promotional and marketing activity that exists. Efforts to induce someone to buy from one's own company, as opposed to one's competitors, cannot be said to be *per se* corrupt or in bad faith. Likewise, as discussed above, the error in adding an overarching "full awareness" requirement to determine "good faith" is clear, because the agency's own regulation requires disclosure *only* where such payments "affect a material term of the agreement." See 7 C.F.R. § 46.2(hh).

The expansive parameters of the court's commercial bribery standard are nowhere more evident than in its application to ordinary business lunches and sales incentives – perhaps the most mundane of all promotional activities. The court held that "[s]ocial hospitality – for example, taking a friend who happens to be a purchasing agent to dinner – would be protected if the host lacked the intent to induce purchase of its products (or, if it had such

intent, informed the agent's principal)," and that "sales incentives offered to a purchasing agent are perfectly legal . . . if the agent's principal is informed of the transaction." Pet. App. 10a-11a. Under this standard, even the most routine promotional activities become commercial bribes if the employer is not fully informed of the activity.

The court of appeals' end-run around the PACA Amendments unfairly prejudiced JSG's ability to establish that the 35 invoice adjustments on the L&P transactions were protected good faith collateral fees and expenses. The elements of intent to induce and employer awareness simply do not appear in the statute or regulations as relevant to the determination of whether these invoice adjustments are protected under section 2(4). Instead, the only relevant inquiry is whether these invoice adjustments were made in good faith "in connection with the distribution or marketing of any perishable agricultural commodity." See 7 U.S.C. § 499a(b)(13). Moreover, in affirming the Judicial Officer's "full awareness" standard and his refusal to reopen the record, the court of appeals denied JSG fair notice and a full opportunity to address the new commercial bribery standard retroactively applied to this case. See *NLRB* v. *Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 267, 295 (1974). Indeed, if the correct standard for commercial bribery were applied, with proper consideration of the PACA Amendments, the Judicial Officer could not have concluded that JSG engaged in commercial bribery as to *any* of the challenged transactions. Accordingly, it is essential to remand the case to the Judicial Officer for proper application of the PACA Amendments, because these 35 transactions formed the heart of the USDA's case against JSG and unquestionably led to the Judicial Officer's finding that the commercial bribes were flagrant and repeated, which caused him to revoke JSG's license.

B. This decision has immediate and critical effects on the way business is transacted within the produce industry.

Promotional, marketing and distribution payments are essential to move produce quickly, offset losses, and hedge risks heightened by the distressed sale position of buyers and sellers and the volatility of supply and demand for these highly perishable goods. These payments have been expressly protected by Congress, and are a significant and pervasive component of trade practices within the industry that have been the subject of recent studies by the USDA. The court of appeals' decision threatens all this, creating a metaphysical distinction between promotional activities designed to induce sales (which are prohibited if not fully disclosed) and other promotional activities (which are permitted), although the industry is left to speculate as to what the purpose of those permitted promotional activities would be, if not to induce sales. In addition, the court's "full awareness" standard not only fails to specify which party is obligated to make the customers "fully aware" – the sellers and shippers who sell the produce or the buyers and brokers who purchase the produce – but also ignores the realities of how business is conducted within this unique industry.

As a result of this decision, companies will be deluged with communications from shippers and sellers seeking to fully inform them of their intent to engage in promotional activities. Because buyers commonly transact business on behalf of several companies simultaneously, sellers will not know which of the buyer's many customers should be made "fully aware." Sellers will also be left to speculate as to who at the customer's place of business must be made "fully aware" and the manner in which they must make the customer "fully aware." In addition, sellers will be placed in the untenable position of having to explain to buyers that their promotional or marketing activities are *not* for the purpose of encouraging the agent to buy from them, despite the fact that that is precisely the intended purpose of their efforts, or will have to ensure that the employer is fully aware of the activities – whatever that entails. These consequences will be

impractical, time-consuming and costly for participants in this industry where speed and efficiency are critical to avoiding losses, and jeopardize the very nature of how business gets done effectively and honestly in the produce industry. Ironically, the very purpose of providing incentives will be thwarted by the cumbersome requirements the court of appeals has placed on those who provide them. The ultimate effect of these requirements, as with any other measure that retards the movement of produce and increases the risk of delay, will be felt by the consumer, who mitigates the industry's losses by paying higher prices for produce.

Moreover, a significant amount of business conducted by commission merchants, dealers and brokers within the produce industry is transacted in the middle of the night. Shipments are loaded and delivered during these late-night hours, requiring buyers and sellers to make decisions on the spot concerning quality and quantity, depending on their needs and the condition of the shipments on delivery. It is simply impossible to make the relevant customers who are not working during those hours "fully aware" of collateral fees and payments. Thus, the court's "full awareness" standard will bring these late-night and early-morning shipments of ripening produce to a standstill until the customer can be identified and contacted to make the appropriate disclosure. Trucks transporting the produce will become *de facto* storage facilities until that time, because the produce cannot be unloaded until the required disclosures are made. Thus, the trucking companies will be prevented from making additional runs, causing a bottleneck in the movement of ripening produce that will not only affect the trucking companies whose profits are dependent upon the number of deliveries made, but also the growers, whose produce will not timely reach the market before deteriorating, and other customers depending on the trucking companies to deliver the shipments required to fulfill their own business needs.

The decision also creates difficult, and perhaps unintended, consequences for the agency seeking to enforce this standard, as well as for courts adjudicating disputes that arise under it. All routine promotional activity will be immediately suspect, because the intent of the individual providing the promotional fees, and the employer's knowledge of such fees, are not readily apparent or objectively discernible. The absence of objective criteria by which these activities can be measured will thrust the USDA into a virtually standardless enforcement regime, creating a compelling risk of underenforcement or overenforcement by the agency. Courts will similarly be burdened with trying to clarify the murky waters of promotional activities with benign intent – whatever those might be – and promotional activities of the sort proscribed by the court of appeals, as well as the level of the employer's awareness of the challenged activities. These harmful consequences are the direct result of the court of appeals' unwarranted and erroneous expansion of commercial bribery as read into section 2(4) of PACA.

Reversing the court of appeals' decision does not mean that the implied duty in section 2(4) against commercial bribery will be rendered a nullity. Kickback payments surreptitiously made to a buyer in exchange for purchases from the payer would clearly be proscribed under a commercial bribery standard requiring corrupt intent or a *quid pro quo*. Requiring corrupt intent or a *quid pro quo* will ensure that such unfair trade practices will be prohibited, yet still permit the normal flow of business within the produce industry. Section 2(4)'s implied duty against commercial bribery should not include efforts simply designed to give a firm a competitive advantage over its competitors, as that is the intended purpose of *all* promotional activities within a competitive industry. Requiring more than simple intent to induce and secrecy would make it clear that routine promotional and marketing efforts are permissible, but surreptitious, corrupt payments in exchange for favorable treatment are not. This Court should

grant certiorari to review the court of appeals' expansive and unwarranted interpretation of commercial bribery and give effect to the protections Congress intended for promotional and marketing activities made in good faith, before the damaging repercussions of this decision are felt throughout this industry.

II. THE DECISION BELOW IS IRRECONCILABLE WITH THE STATUTORY LANGUAGE CREATING ENFORCEABLE DUTIES UNDER PACA, AGENCY PRECEDENT, AND WITH A RECENT DECISION OF THIS COURT.

A. The court of appeals' commercial bribery standard requiring no nexus to a particular PACA transaction contradicts both the express language of the statute and the reasoning of this Court in *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999). The proscriptions in section 2 of PACA against unfair trade practices, including the failure "to perform any specification or duty, express or implied," are only prohibited if done "in connection with any transaction." See 7 U.S.C. § 499b. Indeed, there is little danger that a party will be harmed by an unfair trade practice if that practice is not "in connection with any [PACA] transaction." See *id.* However, the court of appeals read the words "in connection with any transaction" right out of the statute by failing to require a nexus to a particular PACA transaction, and instead defined commercial bribery to include undisclosed activities designed simply to create business goodwill. A commercial bribery standard that does not require a nexus to a particular transaction casts a cloud of suspicion over all promotional and marketing efforts undertaken without any particular transaction in mind that are considered by members of this industry (and Congress) to be a business necessity and perfectly legitimate.

The requirement that some particular PACA transaction be implicated under section 2(4) is supported by this Court's recent interpretation of the federal gratuities statute in *Sun-*

Diamond, which contains language limiting its reach that is similar to section 2(4). The federal gratuities statute prohibits giving or receiving something of value "for or because of any official act." See 18 U.S.C. § 201(c)(1). The government took the position that the statute "reaches any effort to buy favor or generalized goodwill from an official who either has been, is, or may at some unknown, unspecified later time, be *in a position to act* favorably to the giver's interests," without any requirement that the gift be connected to a particular official act. *Sun-Diamond*, 526 U.S. at 405. This Court rejected the government's argument:

> [T]he statutory text . . . prohibits only gratuities given or received "for or because of *any official act* performed or to be performed" (emphasis added). It seems to us that this means "for or because of some particular official act of whatever identity" – just as the question "Do you like any composer?" normally means "Do you like some particular composer?" It is linguistically possible, of course, for the phrase to mean "for or because of official acts in general, without specification as to which one" – just as the question "Do you like any composer?" could mean "Do you like all composers, no matter what their names or music?" But the former seems to us the more natural meaning . . . .

Id. at 406. This Court concluded that the statute's "insistence upon an 'official act' . . . seems pregnant with the requirement that some particular official act be identified and proved," noting that if the government's position were correct, "it would have sufficed to say 'for or because of such official's ability to favor the donor in executing the functions of his office.'" *Id.*

The court of appeals' decision prohibits promotional payments intended simply to enhance the payer's competitive position or to create business goodwill, regardless of whether the payer had any particular business transaction in mind or immediate business needs to be fulfilled by the particular

recipient. However, section 2(4)'s prohibition on failing to perform any specification or duty arising out of any undertaking in connection with any PACA transaction, like the gratuities statute in *Sun-Diamond*, must be read to prohibit payments made in connection with some particular PACA transaction, rather than simply made to a buyer because of the buyer's "'ability to favor the donor in executing the functions of his [position].'" See 526 U.S. at 406. It was precisely the inchoate, nonspecific nature of the act sought to be influenced that led this Court in *Sun-Diamond* to require that the words of the statute requiring a nexus to a *particular* act be given their natural and intended meaning. For the same reasons, section 2(4) cannot be read to prohibit payments intended to create "generalized goodwill"; rather the natural and intended meaning of this section is to prohibit unlawful payments "in connection with" a particular PACA transaction.

The court of appeals' failure to require a nexus between the challenged activities and some particular transaction not only impugns routine promotional and marketing efforts undertaken without any particular transaction in mind, but also extends the reach of section 2(4) to encompass transactions in which no one was subjected to, or harmed by, an unfair trade practice prohibited by section 2. As a result, even activities causing no harm to another party can nonetheless be deemed a violation of section 2(4) – a result that contradicts the express language and intent of that provision. In this case, for example, the element of harm was noticeably lacking. There was substantial testimony that the principals of L&P and American Banana knew about their buyers' other business activities unrelated to L&P and American Banana. JSG's Exs. 51 (Beni Aff.) & 16 (Prisco Aff.); JSG's Ex. 49 (May 3, 1993 Report of Investigation) at 5. There was evidence that Anthony Gentile purchased produce from whomever had the best price and that the principal of American Banana was actively involved in pricing decisions for purchases from JSG. Tr. 2821 (A.

Gentile Test.), 397, 404 (Contos Test.). The evidence also shows that both Anthony Gentile and Lomoriello continued to buy for L&P and American Banana, respectively, even after the challenged transactions were made known to the principals. *E.g.* Pet. App. 32a, 66a; Tr. 315 (Contos Test.); JSG's Ex. 49 (May 3, 1993 Report of Investigation) at 5. In addition, there was no finding that any competitors of JSG were harmed as a result of the challenged transactions, nor was there any finding that either L&P or American Banana paid higher prices for the produce as a result of the challenged transactions. Under these circumstances, it is difficult to understand how section 2's purposes of eliminating unfair trade practices in connection with produce transactions are furthered by stretching section 2(4)'s commercial bribery prohibition to the limits adopted by the court of appeals.

A requirement that the challenged payment be linked to a particular PACA transaction would eliminate several transactions that led to the Judicial Officer's finding of flagrant and repeated violations in this case. There was no finding that the payment to Gloria Gentile was linked to any particular transaction, and the court of appeals itself expressed doubts that this payment was a commercial bribe. Pet. App. 5a. The stock transaction between Goodman and Gloria Gentile would also be eliminated, because the payments for the stock were made pursuant to detailed contractual provisions having nothing whatsoever to do with whether any produce was purchased. The fact that the payments were taken from Goodman's personal commissions on L&P transactions does not compel a contrary result, because payments were required under the installment provision in the contract, subject to the annual limit, regardless of whether L&P transacted any business with JSG.

B. Prior to this decision, the USDA's long-standing practice was to look to state law to interpret the nature and scope of implied duties under section 2(4) where the Act and the regulations do not prescribe the duty. See *Rich-Seapak*

Corp. v. *Pro-Ag, Inc.*, 56 Agric. Dec. 1958, 1965-66 (1997); *Flanagan & Jones, Inc.* v. *World Wide Consultants, Inc.*, 53 Agric. Dec. 828, 858 n.22 (1994); *Salinas Lettuce Farmers Coop.*, 50 Agric. Dec. 984, 989 n.8 (1991). Although commercial bribery laws vary significantly from state to state, many states, including New Jersey, where JSG is located, require proof of a *quid pro quo* to establish commercial bribery. See N.J. Stat. Ann. § 2C:21-10(a).[2] To the extent that it is appropriate to look to federal law as a source of implied duties under section 2(4) at all, the federal bribery statute, codified at 18 U.S.C. § 201(b), would be the most appropriate federal law to provide the standard for commercial bribery, and that statute clearly requires a *quid pro quo* to establish a violation of the offense. See *Sun-Diamond*, 526 U.S. at 404-05 ("for bribery there must be a *quid pro quo* – a specific intent to give or receive something of value *in exchange* for an official act").

Application of a *quid pro quo* requirement to this case would eliminate many of the challenged transactions from this case. With respect to the L&P transactions, there was no finding of a specific loan to Anthony Gentile that was supposedly reduced by the 16 checks listed in JSG's books as loans, nor was there any finding that any of the 35 checks ever left JSG's accounts or that the underlying funds were ever received by Anthony Gentile. Thus, for 19, if not all, of these transactions, there is no evidence of a financial benefit to Anthony Gentile in exchange for purchases from JSG. There also was no finding that JSG's payment to Gloria Gentile was made in exchange for purchases by Anthony

---

[2] *See also* 18 Pa. Cons. Stat. Ann. § 4108; Tex. Penal Code Ann. § 32.43; Cal. Penal Code § 641.3; Model Penal Code § 224.8. Some states define commercial bribery to include the lack of knowledge and consent of the employer, *see* 720 Ill. Comp. Stat. 5/29A-1; while others do not, *see* Colo. Rev. Stat. § 18-5-401; Fla. Stat. ch. 838.16; and at least one state requires that the challenged act cause economic loss, *see* Ariz. Rev. Stat. § 13-2605.

Gentile from JSG. Goodman's purchase of Gloria Gentile's stock similarly lacked evidence that it was in exchange for additional purchases of JSG's produce by Anthony Gentile. Eliminating these transactions from consideration significantly alters the cumulative effect of the evidence on the issue of whether the violations were flagrant and repeated so as to warrant the devastatingly severe sanction of revocation of JSG's license.[3]

For the reasons outlined above, this Court should grant this petition for certiorari to vindicate the regulatory scheme created by Congress, and to make clear to the members of the $100 billion produce industry that good faith promotional and other activities designed to enhance business and the movement of produce are not illegal. The specter of commercial bribery should not force companies wishing to engage in these activities to either refrain or to inundate companies with communications designed to make them fully aware. The ramifications for the ordinary course of business within this industry in which promotional and marketing activities are an essential business function amply justify immediate review by this Court.

---

[3] Moreover, the agency's unexplained reversal of its practice of looking to state law to interpret duties implied under section 2(4) raises serious issues of fair notice. *See Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ROBERT M. ADLER
JOHN M. HIMMELBERG
O'CONNOR & HANNAN, L.L.P.
1666 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 887-1400

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
JOAN M. MACAULAY
SIDLEY AUSTIN BROWN & WOOD
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

July 20, 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 00-1011

JSG TRADING CORP.,
Petitioner,

v.

DEPARTMENT OF AGRICULTURE
and United States of America,
Respondents.

Argued Nov. 1, 2000
Decided Jan. 5, 2001

Before: SENTELLE, RANDOLPH, and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

This case returns to us after remand on JSG Trading Corp.'s petition for review of a Department of Agriculture order adjudging it guilty of commercial bribery and revoking its license to sell produce under the Perishable Agricultural Commodities Act. We outlined many of the financial dealings at issue here in *JSG Trading Corp. v. United States Dep't of Agric.*, 176 F.3d 536 (D.C.Cir.1999), and will assume familiarity with that opinion. This time around JSG challenges the sufficiency of the evidence and raises three questions: (1) did the Department apply the wrong legal standard for commercial bribery? (2) were the payees principals in the victim companies, thereby precluding a finding of commercial bribery? and (3) is license revocation excessive? We answer no to each and deny the petition.

I.

Section 2(4) of the Perishable Agricultural Commodities Act of 1930 (PACA) forbids "any commission merchant, dealer or broker * * * to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such [produce] transaction." 7 U.S.C. § 499b(4).[1] The Department has drawn from this language a duty of produce sellers not to corrupt agents and employees of their buyers, and has styled the breach of this duty "commercial bribery." In brief, this duty is breached—and commercial bribery results—when a seller offers consideration to a buyer's agent or employee, without the knowledge of the principal or employer, with intent to induce purchase of the seller's product. *See In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd*, 945 F.2d 398 (4th Cir.1991) (table), and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd*, 953 F.2d 639 (4th Cir.1992) (table).

---

[1] Title 7, U.S.C. § 499b(4) states in full:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce [f]or any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under subsection 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

JSG Trading Corp. is a New Jersey-based PACA licensee engaged in buying and selling produce. L&P and American Banana are produce dealers at the Hunts Point Market in New York City. L&P and American Banana purchased tomatoes from JSG through purchasing agents—Anthony Gentile for L&P; Albert Lomoriello for American Banana. In early 1993, the Department began investigating whether JSG sought to covertly influence Anthony Gentile and Albert Lomoriello to purchase more tomatoes from JSG on behalf of their respective principals in violation of PACA § 2(4), as interpreted in *Goodman* and *Tipco*. The Department identified what it considered questionable transactions and accounting practices, several of which an Administrative Law Judge found were commercial bribes. The ALJ ordered JSG's license revoked. *See In re JSG Trading Corp.*, 56 Agric. Dec. 1800 (1997). The Department's Judicial Officer affirmed the ALJ's findings and order. *See In re JSG Trading Corp.*, 57 Agric. Dec. 640 (1998).

II.

A. Substantial Evidence

An agency's adjudicative orders must be supported by "substantial evidence," 5 U.S.C. § 706(2)(E), which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" when taking "into account whatever in the record fairly detracts from its weight." *See AT&T Corp. v. FCC*, 86 F.3d 242, 247 (D.C.Cir.1996) (quoting *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 59 S.Ct. 501, 83 L.Ed. 660 (1939), and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951)); *McCarty Farms, Inc. v. Surface Transp. Bd.*, 158 F.3d 1294, 1300-01 (D.C.Cir.1998). There is substantial evidence to support the Judicial Officer's finding that JSG's payments, described below, to Anthony Gentile, to his wife Gloria Gentile, and to Albert Lomoriello were commercial bribes under *Goodman* and *Tipco*.

The payments at issue here consisted of: 35 checks to Anthony Gentile totaling $62,535.60; payments to Gloria Gentile, including an unjustified gain on a stock sale; a check for $5,600 to G&T Enterprises, a company Gloria Gentile set up for tax purposes; and seven checks to Albert Lomoriello totaling $9,733.45.[2]

JSG tendered numerous "innocent" explanations for these transactions and the bizarre accounting practices surrounding them, none of which is persuasive. For instance, JSG insists that the checks made out to Anthony Gentile were "circular" because they were redeposited in JSG's accounts with no money ever reaching the payee. According to JSG, "none of the monies reflected by these checks ever reached Mr. Gentile or [was] otherwise paid by JSG to any person (or any entity) for his benefit." Final Brief of Petitioner at 18. The checks, JSG claims, functioned as "clips," a mechanism to reconcile accounts: "these 'clips' were used . . . in order to permit L&P to pay less than JSG's invoiced prices in order to make up for a loss on prior purchases." *Id.* at 20 n.19. But writing checks payable to another company's purchasing agent and then redepositing them into one's own account is hardly a recognized or plausible way to reconcile accounts between a seller and the payee's principal, the buyer. The normal function of checks is to move money from one account to another, not to keep it in place. Making checks payable to L&P's purchasing agent and then re-depositing them does not appear, as JSG claims, to "permit L&P to pay less than JSG's invoiced prices." The Judicial Officer had ample evidence for finding JSG's explanations chimerical, particularly in light of the inability of JSG's officers to give a coherent

---

[2] On remand, the Judicial Officer found that JSG's lease of a Mercedes to Anthony Gentile, paid for in part by JSG; its sale of a boat to Mr. Gentile for a fraction of its value; and its gift of a $3,317 Rolex watch to Mr. Gentile were not commercial bribes because they were not intended to induce him to purchase tomatoes and L&P was aware of the transactions. *See In re JSG Trading Corp.*, 58 Agric. Dec. 1041, 1061 (1999).

explanation of this unusual accounting procedure; JSG's treatment of the payments in its records as profit-sharing with Mr. Gentile and as reductions in Mr. Gentile's debt to JSG; and the apparent relationship between the amount of each check and a per-box commission noted in JSG's records.[3] *See* 58 Agric. Dec. at 1064-77.

The Judicial Officer was also on solid ground in rejecting JSG's explanations for its payments to Mrs. Gentile and Mr. Lomoriello. No evidence indicates the payments were compensation for any legitimate service rendered. Much evidence tends to show that the payments were secret per-box commissions intended to induce the purchase of more tomatoes from JSG. *See* 58 Agric. Dec. at 1061-64 & 1081-88. We have doubts, however, about the $5,600 check to Mrs. Gentile's company, G&T. In its opposition to JSG's motion to dismiss the case on remand, the Department appeared to concede that the payment to G&T was not a commercial bribe, a statement inconsistent with its position in this court. *See* Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment at 5 & n.2; Joint Appendix at 389. At any rate, we cannot see how the $5,600 payment could affect the outcome of this case. The remaining payments to Mr. and Mrs. Gentile and Mr. Lomoriello amply support revocation of JSG's PACA license.

B. Legal Standard for Commercial Bribery

JSG claims the Judicial Officer misapplied the commercial bribery standard articulated in *Goodman* and *Tipco*. In our first opinion in this case, we held that the Judicial Officer erred in substituting a per se test for *Goodman's* and *Tipco's* intent-to-induce and secrecy standard. *See* 176 F.3d at 543-46. Under the per se test, any payment to a purchasing agent

---

[3] JSG stated at oral argument that it was not challenging the Judicial Officer's finding that 16 of the 35 checks were used to reduce Mr. Gentile's debt to JSG.

above a *de minimis* threshold constituted a commercial bribe, regardless of intent and secrecy. We remanded for the Judicial Officer either to justify or to abandon the per se test. He adopted the latter course.

On remand, the Judicial Officer interpreted PACA's duty requirement as imposing on "each commission merchant, dealer, and broker . . . an obligation . . . to avoid making or offering a payment to a purchasing agent to encourage that agent to purchase produce from the commission merchant, dealer, or broker on behalf of the agent's principal or employer, without fully informing the purchasing agent's principal or employer of the offer or payment." 58 Agric. Dec. at 1051. He disaggregated this obligation into a four-part test:

> Proof that: (1) a commission merchant, dealer, or broker made a payment to or offered to pay a purchasing agent; (2) the value of the payment or offer was more than *de minimis*; (3) the payment or offer was intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; and (4) the purchasing agent's principal or employer was not fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent, raises the rebuttable presumption that the commission merchant, dealer, or broker making the payment or offer violated section 2(4) of the PACA.

58 Agric. Dec. at 1051. The presumption is rebutted by the absence of any one element. *See id.*

JSG perceives in this phrasing of the test three substantial and unexplained departures from *Goodman, Tipco,* and our opinion in *JSG Trading Corp.*: (1) failure to require a specific *corrupt* intent to induce; (2) equation of secrecy with the payee's principal's or employer's lack of full awareness of

the payment or offer; and (3) omission of a *quid pro quo* requirement. This new test, JSG insists, is the per se test redux, and will "turn countless normal business transactions in to [*sic*] bribes." Final Brief of Petitioner at 33-34.

The Judicial Officer's test is consistent with *Goodman* and *Tipco*. Although couched as a presumption,[4] the post-remand articulation of the test is a more formalized version of the *Goodman/Tipco* intent-to-induce and secrecy standard. When the presumption language is cast aside, the test's basic structure parallels that of many criminal statutes. There are four elements, each of which is a necessary predicate for liability. Failure to satisfy any one element defeats liability. The only significant divergence from *Goodman* and *Tipco* is the addition of a *de minimis* threshold as an apparent defense to payments or offers to pay that otherwise satisfy the intent and secrecy elements. This *de minimis* element is the converse of that which we rejected in *JSG Trading Corp.*, wherein a payment above the *de minimis* threshold was a sufficient rather than a necessary condition for liability. The addition of this liability-defeating element is innocuous and, in any event, JSG does not challenge it.

Neither *Goodman, Tipco,* nor our opinion in *JSG Trading Corp.* requires a specific corrupt intent, a lower secrecy standard, or a *quid pro quo* for commercial bribery. In both *Goodman* and *Tipco,* a generalized intent by the payer to induce purchase of its product satisfied the intent element. In *Goodman,* for example, the Judicial Officer referred to a

---

[4] The presumption language appears not to perform any burden-allocating function ordinarily associated with presumptions. *See, e.g.*, FED.R.EVID. 301 ("In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.").

treatise definition of commercial bribery that contains no hint of specific corrupt intent: "the 'offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the 'gift,' be sufficiently influenced by the offer to favor the offeror over other competitors'." *Goodman,* 49 Agric. Dec. at 1184 (quoting 2 RUDOLF CALLMANN. THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 49 (3d ed.1968)). An "expectation" is far from the specific corrupt intent JSG would require. In another place, the Judicial Officer wrote that a "PACA licensee is obligated to refrain from offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of the employer." *Goodman,* 49 Agric. Dec. at 1186. *See also Tipco,* 50 Agric. Dec. at 883. In *Tipco,* the Judicial Officer concluded that "the evidence of record is certain that licensee Tipco made surreptitious payments to its customer's employee to induce the employee to buy, or continue to buy, its produce. . . ." *Tipco,* 50 Agric. Dec. at 889. *Goodman* and *Tipco* say nothing of specific corrupt intent, let alone enough to make the Judicial Officer's formulation of the intent element in this case arbitrary and capricious.[5]

The secrecy element in *Goodman* and *Tipco* contemplates a sufficiently high level of awareness by the payee's employer or principal to justify the Judicial Officer's insistence on "full awareness." The opinions contain language equating a produce seller's breach of duty to a seller's failure to inform, which connotes an obligation to impart actual knowledge of the payments to the payee's employer or principal. *See Goodman,* 49 Agric. Dec. at 1175, 1179, 1182, & 1186; *Tipco,* 50 Agric. Dec. at 883. The opinions also contain language equating secrecy with the payer's expectation that

---

[5] The occasional references to corrupting agents or employees in *Goodman* and *Tipco* describe the effect of commercial bribery, not the required intent.

the recipient not fully disclose the payment, which connotes an obligation that somebody—either the payer or payee—ensure the recipient's principal or employer has full awareness of the transaction. *See, e.g., Goodman*, 49 Agric. Dec. at 1184. Yet other language suggests that knowledge alone is not enough, that without an affirmative grant of consent by the payee's principal or employer the secrecy element would be satisfied. *See Goodman*, 49 Agric. Dec. at 1186 ("payments by [Goodman] to Messrs. Crandall and Hernandes, without permission of Magruder and Fresh Value, is a violation of section 2(4) of the PACA"); *Tipco*, 50 Agric. Dec. at 883 (suggesting that a produce seller may "only make payments with the customer's permission"). Both cases give produce vendors ample notice that payments intended to induce the buyer's agents or employees to purchase produce are commercial bribes unless the payee's principal or employer is fully aware of the transaction.[6]

Similarly, *Goodman* and *Tipco* do not require a *quid pro quo* arrangement between the payer and the payee. Although a *quid pro quo* arrangement was present in each case—a 25x per box kickback—neither case turned on that fact.[7] Perhaps recognizing this, JSG instead points to our earlier opinion in *JSG Trading Corp.* for a *quid pro quo* requirement. In that opinion, we criticized the per se test's lack of an intent and secrecy element as eliding the line between bribes and legitimate transactions and elliptically suggested a *quid pro quo* element as one way to restore that line. *See JSG Trading Corp.*, 176 F.3d at 545. We did not suggest it was the

[6] In both *Goodman* and *Tipco*, the victim companies had an explicit policy forbidding employees to accept gifts from vendors, which the recipients of the payments in each case clearly breached. *See Goodman*, 49 Agric. Dec. at 1174-75; *Tipco*, 50 Agric. Dec. at 878. Neither case turned on the existence of such a policy.

[7] Notably, the Judicial Officer found, and we agree, that JSG's per-box payment scheme constituted a *quid pro quo*. *See* 58 Agric. Dec. at 1090. As in *Goodman* and *Tipco*, our decision does not turn on this fact.

exclusive means. Indeed, the Judicial Officer fully restored that line by resurrecting the intent and secrecy elements. The federal cases requiring a *quid pro quo* that JSG cites do not persuade us otherwise, for they interpret federal criminal bribery statutes containing entirely different language than PACA.[8] *See, e.g., United States v. Sun-Diamond Growers of California,* 526 U.S. 398, 404-05, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999) (interpreting language in 18 U.S.C. § 201 as requiring a *quid pro quo* for bribery because there must be "a specific intent to give or receive something of value *in exchange* for an official act"); *see also* 2 RUDOLF CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 12.02 (1985) ("There need be no close relationship between the value of the consideration and the resulting advantage to the offeror."). JSG's related contention that its payments had no effect on the victim companies' purchases or prices merely restates the *quid pro quo* argument. To the extent the argument differs, nothing in PACA, *Goodman,* or *Tipco* bases illegality on changes in the victim company's purchasing or pricing behavior.

JSG fears that the commercial bribery test will sweep up legitimate business transactions and ordinary social hospitality. JSG forgets that the intent and secrecy elements are necessary, not sufficient, conditions for commercial bribery, so both must be satisfied. Social hospitality—for example,

---

[8] Given the substantial ambiguity in § 499b(4), it is the Department's function, not ours, to define offenses under that provision. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *JSG Trading Corp.*, 176 F.3d at 545 ("Given the broad language of [PACA] § 2(4), the agency is not necessarily bound by traditional statutory definitions of commercial bribery."). Our review is limited to ensuring that the Department's construction of PACA is reasonable and that the Department either follows its prior constructions of the statute or articulates a reasoned justification for departing.

taking a friend who happens to be a purchasing agent to dinner—would be protected if the host lacked the intent to induce purchase of its products (or, if it had such intent, informed the agent's principal). Similarly, sales incentives offered to a purchasing agent are perfectly legal under the Judicial Officer's test if the agent's principal is informed of the transaction.

The secrecy element in particular also distinguishes the transactions at issue from a category of promotional activities recognized as legitimate by PACA. The paragraph of PACA from which the Department drew the prohibition on commercial bribery states that "this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter." 7 U.S.C. § 499b(4). The statute defines "collateral fees and expenses" as "any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity." 7 U.S.C. § 499a(b)(13). JSG's payments to Anthony and Gloria Gentile and Albert Lomoriello do not fall within this category. Promotional allowances, rebates, and the like are typically given with the buyer's knowledge rather than secretly directed to the buyer's agents or employees. JSG's payments also lack the requisite good faith, which Department regulations define as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." 7 C.F.R. § 46.2(hh). No reasonable conception of honesty or fair dealing includes secret payments designed to corrupt a produce buyer's agents or employees.

C. Status of the Payees

The essence of the commercial bribery offense, as defined by *Goodman* and *Tipco,* is the corruption or attempted corruption by the produce seller of its buyer's agent or employee. So framed, it does not cover payments made to an

employer or a principal. Nor could it, as payments made to the produce buyer itself, as opposed to its agents or employees, do not possess the requisite secrecy. If Mr. Gentile and Mr. Lomoriello were principals in L&P and American Banana, then JSG did not commit commercial bribery.

We agree with the Judicial Officer that they were not principals. They were purchasing agents. *See* 58 Agric. Dec. at 1051 (characterizing Mr. Gentile and Mr. Lomoriello as purchasing agents). Mr. Gentile's and Mr. Lomoriello's joint account arrangements [9] with L&P and American Banana do not alter the basic fact that these companies hired them to buy and sell tomatoes on the companies' behalf. Although each man shared profits and losses on his tomato transactions, there is no evidence that either became a full partner in his respective firm. Mr. Gentile, for instance, shared 15 percent of the profits and losses on his tomato sales for L&P. Nothing indicates he shared in profits and losses on any firm activity other than that which he was specifically engaged to perform, whereas full partners in a business typically share profits and losses in all the firm's activities. *See, e.g.*, UNIF. P'SHIP ACT § 202(a) (1997) (defining partnership as "the association of two or more persons to carry on as co-owners a business for profit"). Likewise, Mr. Lomoriello shared 40 percent of the profits and losses on his produce transactions for American Banana, but nothing indicates he shared in American Banana's overall profits and losses or otherwise became a co-owner. Far from indicating co-ownership, the limited profit- and loss-sharing arrangements were a performance-based compensation mechanism fully consistent with Mr. Gentile's and Mr. Lomoriello's status as agents or

---

[9] The Department's regulations define a joint account transaction as "a produce transaction in commerce in which two or more persons participate under a limited joint venture arrangement whereby they agree to share in a prescribed manner the costs, profits, or losses resulting from such transaction." 7 C.F.R. § 46.2(s).

employees. *See* 58 Agric. Dec. at 1093-94; *see also* UNIF. P'SHIP ACT § 202(c)(2) & (3) (1997) (Stating that "the sharing of gross returns does not by itself establish a partnership," and that "a person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment . . . for services as an independent contractor or of wages or other compensation to an employee.").

JSG nonetheless contends that Mr. Gentile and Mr. Lomoriello were independent brokers and argues, without citation, that "payments to independent brokers are permissible under the PACA." *See* Final Brief of Petitioner at 46-48. JSG apparently believes that independent brokers are principals because they are subject to PACA. The statute itself belies this claim. Brokers by definition negotiate "for or on behalf of the vendor or the purchaser." [10] 7 U.S.C. § 499a(b)(7). Agents, not principals, act on another's behalf. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (Tentative Draft No. 1, 2000) ("Agency is the fiduciary relationship that arises when one person (the 'principal') manifests consent to another person (the 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent consents so to act."). Nor does the requirement in 7 U.S.C. § 499c(a) that brokers obtain licenses make them principals. A broker's status as a principal, an agent, or an employee depends on its relationship to other parties in a transaction, not its possession of a license.

---

[10] PACA defines a "broker" as "any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively, except that no person shall be deemed to be a 'broker' if such person is an independent agent negotiating sales for and on behalf of the vendor and if the only sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of $230,000 in any calendar year." 7 U.S.C. § 499a(b)(7).

D. License Revocation

Section 8(a) of PACA permits license revocation for "flagrant or repeated" violations of § 2 (7 U.S.C. § 499b). *See* 7 U.S.C. § 499h(a).[11] The Judicial Officer found JSG's bribes "willful, flagrant, and repeated violations of section 2(4) of the PACA" (7 U.S.C. § 499b(4)) and revoked its license. *See* 58 Agric. Dec. at 1094. We will not lightly disturb the Department's choice of remedy under a statute committed to its enforcement, especially given the Department's superior knowledge of the industry PACA regulates. *See Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973) (Upholding Department of Agriculture suspension order under the Packers and Stockyards Act and reasoning that "where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy[,] 'the relation of remedy to policy is peculiarly a matter for administrative competence'."); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 267 (2d Cir.1997) (courts "must defer to the agency's judgment as to the appropriate sanctions for PACA violations" because the Department of Agriculture "is particularly familiar with the problems inherent in the

---

[11] Subsection 499h(a) states in its entirety: "Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender." 7 U.S.C. § 499h(a). JSG appears to be a dealer. *See* 7 U.S.C. § 499a(b)(6) (defining "dealer" as an entity "engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . .").

produce industry, and it has experience conforming the behavior of produce companies to the requirements of PACA").

Nothing in the record persuades us that JSG's payments to the Gentiles and Albert Lomoriello were anything but flagrant and repeated. The bribes in this case were as flagrant as those in *Goodman* and *Tipco*. The Department revoked the defendants' licenses in both cases, providing ample notice that commercial bribes may result in revocation. The only difference from those cases is that JSG apparently did not surcharge its customers to pay for the bribes. That distinction does not diminish the wilfulness of JSG's conduct or the corruption it worked on its buyers' purchasing agents. The Department acted well within its discretion in revoking JSG's license.

We also reject JSG's claim that the Department's denial of its motion to reopen the record was arbitrary and capricious. Some of the supplemental points JSG wished to present were not relevant to a finding of commercial bribery under *Goodman* and *Tipco*. JSG had ample opportunity before the record closed to present the others.

Petition denied.

APPENDIX B

UNITED STATES DEPARTMENT
OF AGRICULTURE (U.S.D.A.)

In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.,
PACA Docket No. D-94-0508.

In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES, AND ANTHONY GENTILE.
PACA Docket No. D-94-0526.

Decision and Order on Remand as to
JSG Trading Corp. filed November 29, 1999

Decision and Order issued by William G. Jenson, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted the disciplinary proceeding captioned PACA Docket No. D-94-0508 pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) by filing a Complaint on November 8, 1993.[1]

---

[1] PACA Docket No. D-94-0526 is a related disciplinary proceeding which has been concluded and forms no part of this Decision and Order on Remand as to JSG Trading Corp.

On April 8, 1994, Complainant filed an Amended Complaint alleging that JSG Trading Corp. [hereinafter Respondent] willfully, flagrantly, and repeatedly violated section 2(4) of the PACA.[2] Specifically, the Amended Complaint alleges that: (1) during the period from January 3, 1992, through February 24, 1993, Respondent, G&T, and Mr. Gentile engaged in a scheme in which Respondent made payments to G&T, under the direction, management, and control of Mr. Gentile, to induce G&T to purchase tomatoes from Respondent on behalf of L&P Fruit Corp. [hereinafter L&P]; and (2) during the period from December 15, 1992, through February 24, 1993, Respondent and Mr. Lomoriello engaged in a scheme whereby Respondent made payments to Mr. Lomoriello to induce him to purchase tomatoes from Respondent on behalf of American Banana Co., Inc. [hereinafter American Banana]. The Amended Complaint requests revocation of Respondent's PACA license. Respondent filed an answer denying the material allegations in the Complaint and the Amended Complaint.

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] presided over a 15-day hearing in New York, New York. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], Washington, DC, represented Complainant. Mark C.H. Mandell, Annandale, New Jersey, represented Respondent.[3]

---

[2] The Amended Complaint also alleges that Gloria and Tony Enterprises, d/b/a G&T Enterprises [hereinafter G&T], Anthony Gentile, and Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA. However, as this Decision and Order on Remand as to JSG Trading Corp. relates to Respondent, I limit the references to allegations against, responses by, and filings by G&T and Messrs. Gentile and Lomoriello to those necessary to describe the status of this proceeding as it relates to Respondent.

[3] On July 11, 1997, Mr. John V. Esposito and Mr. Mel Cottone of the Law Offices of Cottone & Esposito, Hiltion Head Island, South Carolina, entered an appearance on behalf of Respondent. Subsequently, Richard M.

Subsequent to the hearing, Complainant and Respondent filed post-hearing briefs.

On June 17, 1997, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which, *inter alia*, the ALJ: (1) found that payments by Respondent to Messrs. Gentile and Lomoriello constituted commercial bribery; (2) found that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA; and (3) revoked Respondent's PACA license.

On September 23, 1997, Respondent appealed to the Judicial Officer. On November 7, 1997, Complainant filed Complainant's Response to Appeal Petitions,[4] and on November 13, 1997, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

On March 2, 1998, I issued a Decision and Order as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile [hereinafter Decision and Order] in which I adopted the Initial Decision and Order as the final Decision and Order. *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999).

On April 28, 1998, Respondent filed a petition for reconsideration of the March 2, 1998, Decision and Order; on May 14, 1998, Complainant filed a reply to Respondent's petition for reconsideration; and on May 19, 1998, the Hearing Clerk transmitted the record of the proceeding to the

---

Adler of O'Connor & Hannan, LLP, Washington, DC, entered an apperance on behalf of Respondent.

[4] On February 2, 1998, Complainant filed an amended version of Complainant's Response to Appeal Petitions, which corrects incorrect transcipt citations in Complainant's Response to Appeal Petitions, filed November 7, 1997

Judicial Officer for reconsideration of the Decision and Order issued March 2, 1998.

On June 1, 1998, I denied Respondent's petition for reconsideration. *In re JSG Trading Corp.*, 57 Agric. Dec. 710 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); and on July 30, 1998, I issued a stay of the order revoking Respondent's PACA license, pending judicial review. *In re JSG Trading Corp.*, 57 Agric. Dec. 1715 (1998) (Stay Order as to JSG Trading Corp.).

Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit challenging the revocation of its PACA license. The Court granted Respondent's petition for review, stating, as follows:

> In this petition for review, JSG challenges the revocation of its license, alleging that the Judicial Officer was proceeding from an incorrect legal premise, namely, that *any* payment by a produce dealer to a purchasing agent above a *de minimis* level constitutes "commercial bribery" in violation of § 2(4) of PACA. JSG argues that this *per se* standard represents a marked departure from agency precedent, and that the case should be remanded for factual findings in accordance with the correct legal standard.
>
> We agree that, in adopting a *per se* standard to measure commercial bribery, the Judicial Officer departed from well established precedent without adequate justification. We therefore remand the case to the agency, so that it may either attempt to justify its creation of a new, *per se* standard or make explicit factual findings pursuant to established law.

JSG Trading Corp. v. United States Dep't of Agric., 176 F.3d 536, 537 (D.C. Cir. 1999).

On August 2, 1999, Respondent filed Motion to Dismiss and for Entry of Judgment; or, in the Alternative, Petition for

Reopening the Hearing and Record to Take Further Evidence [hereinafter Motion to Dismiss]. On September 13, 1999, Complainant, filed Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment [hereinafter Complainant's Response], in which Complainant opposes Respondent's Motion to Dismiss and requests that I issue a decision and order on remand, finding that Respondent violated section 2(4) of the PACA and revoking Respondent's PACA license. On October 20, 1999, Respondent filed Respondent JSG Trading Corp.'s Reply to Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment [hereinafter Respondent's Reply]; and on November 4, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion to Dismiss and Complainant's request for the issuance of a decision and order on remand.

Respondent contends that the Complaint must be dismissed because the *per se* standard to measure commercial bribery cannot be justified and Complainant cannot prevail under the traditional test for commercial bribery as described in *JSG Trading Corp. v. United States Dep't of Agric., supra* (Respondent's Motion to Dismiss at 2).

I disagree with Respondent's contention that the Complaint must be dismissed. While I abandon the *per se* standard to measure commercial bribery, I find that the record establishes that Respondent engaged in activity that falls within the traditional definitions of commercial bribery, as described in *JSG Trading Corp. v. United States Dep't of Agric., supra.* Therefore, I issue this Decision and Order on Remand as to JSG Trading Corp., in which I conclude that Respondent violated section 2(4) of the PACA.[5]

---

[5] Simultaneously with this Decision and Order on Remand as to JSG Trading Corp., I am filing a Ruling Denying JSG Trading Corp.'s Motion to Dismiss

Complainant's exhibits are designated by "CX," Respondent's, G&T's, and Mr. Gentile's exhibits are designated by "RX," Mr. Lomoriello's exhibits are designated by "RL," and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISION AND REGULATION

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or

to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

7 U.S.C. § 499b(4) (Supp. III 1997).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

. . . .

DUTIES OF LICENSEES

§ 46.26 Duties of licensees.

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.

7 C.F.R. § 46.26.

Introduction

The issue presented is whether a series of payments by Respondent to purchasing agents of two separate produce buyers, L&P and American Banana, at a time when those purchasing agents were buying tomatoes from Respondent on behalf of their respective principals, constitute willful, flagrant, and repeated violations of section 2(4) of the PACA.

Section 2(4) of the PACA prohibits commission merchants, dealers, and brokers from failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity received in interstate or foreign commerce. While section 2(4) of the PACA does not expressly prohibit payments by produce dealers to purchasing agents or employees of that dealer's produce buyers, the Judicial Officer held in *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992), and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992), that activity that falls within the traditional definitions of commercial bribery constitutes a violation of section 2(4) of the PACA. Since the issuance of *Goodman*, the produce industry has been on notice that activity that falls within the traditional definitions of commercial bribery is prohibited by the PACA.

In *Goodman* and *Tipco*, produce dealers paid purchasing agents of supermarket chains 25 cents for each box of produce purchased from the produce dealers. The supermarket chains had no knowledge of this arrangement. The Judicial Officer found these actions willful, flagrant, and repeated violations of section 2(4) of the PACA and revoked the produce dealers' PACA licenses, explaining:

> Commercial bribery is considered unfair and prohibited by the courts and administrative agencies because of its

actual and possible effects on competition in the marketplace. An individual or company which makes payments to the employee of another to influence buying

> . . . interposes an obstacle to the competitive opportunity of other traders which is in no way related to any economic advantage possessed by him.' It is the inevitable consequence of commercial bribery, as it is also with other unfair business practices, that competitors will adopt similar tactics to procure business. 'No matter what the character of the competitors' goods, as far as quality is concerned and in the matter of price, such an organization will find it extremely difficult, if not impossible, to sell, the goods upon the basis of their quality and price alone, in the presence of the competitor's entertainment policy . . .' 2 Callman, *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3d ed. 1968).

In re Sid Goodman & Co., supra, 49 Agric. Dec. at 1185-86; *In re Tipco, Inc., supra*, 50 Agric. Dec. at 884-85 (*citing In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-29 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979)).

The Judicial Officer expressed concern that commercial bribery by one firm in a market will inevitably lead to commercial bribery by many firms, in an effort to compete, as follows:

> Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products available in the marketplace. Their distorted judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes

> difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

In re Sid Goodman & Co., supra, 49 Agric. Dec. at 1186; *In re Tipco, Inc., supra*, 50 Agric. Dec. at 885 (*citing In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1043 (1986), *remanded*, 820 F.2d 1103 (9th Cir. 1987), *reprinted in* 51 Agric. Dec. 619 (1992)).

The Judicial Officer provided the following guidelines:

> The totality of the history of the PACA supports a conclusion that members of the produce industry have an obligation to deal fairly with one another—a duty to only deal with one another at arm's length. Included within this obligation is the positive duty to refrain from corrupting an employee of a person with whom it is dealing, *e.g.*, each PACA licensee is obligated to avoid offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of his employer. On the other hand, if the employee seeks a payment from the licensee, the licensee is affirmatively obligated to report that request to its customer, could only make payments with the customer's permission, and, even then, would risk violating PACA with anything more than a *de minimis* payment (e.g., more than a pen, calendar or lighter).

In re Tipco, Inc., supra, 50 Agric. Dec. at 882-83 (footnotes and citations omitted).

Based on these guidelines in *Tipco*, I applied a *per se* test to determine whether Respondent engaged in commercial bribery when Respondent made a series of payments to Mr. Gentile, a purchasing agent for L&P, and Mr. Lomoriello, a purchasing agent for American Banana. I concluded that, since Respondent's payments to the purchasing agents were

more than *de minimis*, Respondent had engaged in commercial bribery, in violation of section 2(4) of the PACA. *In re JSG Trading Corp., supra*, 57 Agric. Dec. at 659. The United States Court of Appeals for the District of Columbia Circuit admonished that Judicial Officer's guidelines in *Tipco* are dicta and, at most, establish a risk of a PACA violation. The Court found that traditional definitions of commercial bribery, adopted in *Goodman* and *Tipco*, require both a finding that a payment or offer of payment is made to induce a purchasing agent to buy from the dealer and a finding that the payment is made surreptitiously, without the knowledge of the purchasing agent's principal. *JSG Trading Corp. v. United States Dep't of Agric., supra*, 176 F.3d at 542. The Court instructed that the broad language in section 2(4) of the PACA does not bind the Secretary of Agriculture to traditional definitions of commercial bribery, but that departure from the use of traditional definitions of commercial bribery requires justification, which I did not provide in *In re JSG Trading Corp., supra.*

The United States Court of Appeals for the District of Columbia Circuit remanded the case to me, requiring me either to explain the justification for using a *per se* test to determine whether Respondent violated section 2(4) of the PACA or to abandon the *per se* test and apply traditional definitions of commercial bribery to determine whether Respondent violated section 2(4) of the PACA. Moreover, the Court stated that several of the gifts given to Mr. Gentile by Mr. Goodman arguably could be promotional allowances in connection with the promotion of Respondent's product, which are specifically permitted under the Perishable Agricultural Commodities Act Amendments of 1995 [hereinafter the PACAA-1995],[6] and that any explanation for

[6] Section 9(b)(3) of the PACAA-1995 amends section 2(4) of the PACA by adding the following sentence at the end of section 2(4) of the PACA: "However, this paragraph shall not be considered to make the

the justification for employing a *per se* test for commercial bribery must be made in conjunction with those amendments. *JSG Trading Corp. v. United States Dep't of Agric., supra*, 176 F.3d at 546-47.

I used the term "commercial bribery" in *In re JSG Trading Corp., supra*, in an effort to describe Respondent's activities. However, my use of the term "commercial bribery" has resulted in the application of the vast jurisprudence related to commercial bribery to the PACA. Since the enactment of the PACA in 1930, only three PACA disciplinary cases [7] have been appealed to the Judicial Officer that concern activities which the Judicial Officer has described as "commercial bribery." The PACA does not specifically prohibit commercial bribery, but rather prohibits commission merchants, dealers, and brokers from failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving perishable agricultural commodities received in interstate or foreign commerce.

"Congress enacted PACA in 1930 in an effort to assure business integrity in an industry thought to be unusually prone to fraud and unfair practices." *JSG Trading Corp. v. United States Dep't of Agric., supra*, 176 F.3d at 537 (*quoting Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. Cir. 1987)). Rather than use a term, such as "commercial bribery," to describe an activity that constitutes a violation of section 2(4) of the PACA, the

---

good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act." Section 9(a) of the PACAA-1995 amends the PACA by adding a new section 1(b)(13), which reads, as follows: "(13) The term 'collateral fees and expenses' means any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity."

[7] *In re JSG Trading Corp., supra*; *In re Tipco, Inc., supra*; and *In re Sid Goodman & Co., supra.*

focus should be on whether the scrutinized activity constitutes a failure to deal fairly, which is required by the PACA. *In re Tipco, Inc., supra*, 50 Agric. Dec. at 882. Any activity by an entity subject to the PACA that the Secretary of Agriculture finds is a failure to deal fairly can constitute a violation of section 2(4) of the PACA.

I find that activity that falls within the traditional definitions of commercial bribery, as described in *JSG Trading Corp. v. United States Dep't of Agric., supra*, constitutes a failure to deal fairly and is a violation of section 2(4) of the PACA. That is, each commission merchant, dealer, and broker has an obligation under section 2(4) of the PACA to avoid making or offering a payment to a purchasing agent to encourage that agent to purchase produce from the commission merchant, dealer, or broker on behalf of the agent's principal or employer, without fully informing the purchasing agent's principal or employer of the offer or payment.

Proof that: (1) a commission merchant, dealer, or broker made a payment to or offered to pay a purchasing agent; (2) the value of the payment or offer was more than *de minimis*; (3) the payment or offer was intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; and (4) the purchasing agent's principal or employer was not fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent, raises the rebuttable presumption that the commission merchant, dealer, or broker making the payment or offer violated section 2(4) of the PACA.

The commission merchant, dealer, or broker may rebut the presumption by showing that: (1) the commission merchant, dealer, or broker did not make a payment to or offer to pay a purchasing agent; (2) the value of the payment or offer was *de minimis*; (3) the payment or offer was not intended to

induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; or (4) the purchasing agent's principal or employer was fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent.

I have carefully reviewed the record in light of *JSG Trading Corp. v. United States Dep't of Agric., supra*, and find that the record supports a conclusion that Respondent violated section 2(4) of the PACA. Specifically, the record contains substantial evidence that: (1) Respondent made payments to Mr. Gentile, a purchasing agent for L&P, one of Respondent's produce customers, and Mr. Lomoriello, a purchasing agent for American Banana, one of Respondent's produce customers; (2) the value of Respondent's payments to Mr. Gentile was more than *de minimis* and the value of Respondent's payments to Mr. Lomoriello was more than *de minimis*; (3) Respondent made at least some of the payments to Mr. Gentile to induce Mr. Gentile to purchase produce from Respondent and Respondent made payments to Mr. Lomoriello to induce Mr. Lomoriello to purchase produce from Respondent; and (4) the principals at L&P were not fully aware of all of the payments made by Respondent to Mr. Gentile and the principals at American Banana were not fully aware of the payments made by Respondent to Mr. Lomoriello. Respondent, Messrs. Gentile and Lomoriello, and G&T introduced evidence to show that the payments to Messrs. Gentile and Lomoriello were not intended to induce Messrs. Gentile and Lomoriello to purchase produce from Respondent and that the principals at L&P knew of the payments to Mr. Gentile and the principals at American Banana knew of the payments to Mr. Lomoriello. The evidence introduced by Respondent, Messrs. Gentile and Lomoriello, and G&T falls far short of rebutting

Complainant's evidence that Respondent violated section 2(4) of the PACA.[8]

Findings of Fact

1. Respondent, JSG Trading Corp., is a corporation organized and existing under the laws of the State of New Jersey. Respondent's business mailing address is PACA Hosing Building, Suite A, 33 Newman Springs Road, Tinton Falls, New Jersey 07724. PACA license number 880547 was issued to Respondent on January 19, 1988. This license has been renewed annually. Since January 1992, Steve Goodman has been president, treasurer, and a holder of 75 per centum of the stock of Respondent and his wife, Jill Goodman, has been vice-president, secretary, and a holder of 25 per centum of the stock of Respondent. Prior to January 1992, Jill Goodman was the sole officer and shareholder of Respondent. (CX 1B.)

2. Mr. Goodman began Respondent in 1988 (Tr. 2154). As of February 1993, Respondent had $36,000,000 in annual sales and employed six or seven produce buyers (Tr. 77). All of the buyers had joint account arrangements with Respondent by which they earn a percentage of the profits derived from their sales (Tr. 2080-81). Mr. Goodman is Respondent's only tomato buyer and seller (Tr. 77). Mr. Goodman earns 50 per centum of the profits derived from his sales (Tr. 2079). Tomato transactions constitute about 40 per centum of Respondent's business (Tr. 78).

3. Anthony Gentile, is an individual whose business mailing address is 119 Third Avenue, Hadley, New York 12835. Mr. Gentile is not licensed under the PACA, but, at all

---

[8] I abandon the *per se* test, which I employed in *In re JSG Trading Corp., supra*, to determine whether Respondent violated section 2(4) of the PACA. Therefore, I do not explain in this Decision and Order on Remand as to JSG Trading Corp, the justification for my use, in *In re JSG Trading Corp., supra*, of a *per se* test to determine whether Respondent engaged in commercial bribery.

times material to this proceeding, was operating subject to the PACA. (Answer of Respondent Anthony Gentile to Amended Complaint ¶ 5.)

4. Gloria and Tony Enterprises, d/b/a G&T Enterprises, is a corporation organized and existing under the laws of the State of New York. G&T's business mailing address is 119 Third Avenue, Hadley, New York 12835. PACA license number 890233 was issued to G&T on November 14, 1988. (Answer of Respondent Gloria and Tony Enterprises to Amended Complaint ¶ 4.) This license expired on November 11, 1990, when G&T advised that it had ceased operation subject to the PACA and failed to pay the required annual renewal fee (CX 1). Gloria Gentile, Mr. Gentile's wife, owns 100 per centum of G&T's stock (CX 1). At all times material to this proceeding, G&T was operating subject to the PACA under the direction, management, and control of Mr. Gentile (Tr. 2948). G&T was formed for tax purposes (Tr. 448, 2829, 2948, 3216).

5. Mr. Gentile became involved in the tomato business when he was a boy and developed great expertise in buying and selling tomatoes (Tr. 2160-61). Starting in approximately 1985, and continuing until approximately 1991, Mr. Gentile was the head salesman, managed the sales operation, and was the tomato buyer at L&P, a produce dealer located at the Hunts Point Market in Bronx, New York (Tr. 442). Mr. Gentile had a joint account arrangement with L&P, and Mr. Gentile would share profits and losses with L&P on the tomatoes that he purchased (Tr. 445). Joint account arrangements are very common in the New York produce industry (Tr. 446, 2894). During the period in which Mr. Gentile was the head salesman for L&P, he was "on the walk," a term used at the Hunts Point Market, which means that he was a salesman who was present on the street (Tr. 2170). While Mr. Gentile was buying tomatoes for L&P, he was considered by many at the Hunts Point Market to be the

person with the most knowledge and influence in that market regarding tomatoes (Tr. 2160-61).

6. During 1986, Mr. Gentile began to establish a relationship with Mr. Goodman, who was then working for another produce dealer (Tr. 2154-55). Mr. Gentile taught Mr. Goodman the tomato business (Tr. 2930). Mr. Goodman soon sold a large volume of tomatoes to L&P through Mr. Gentile (Tr. 2170-71).

7. Mr. Gentile left "the walk" late in 1990 or early in 1991 because he became ill (Tr. 2909). However, from that time through the date of the hearing, Mr. Gentile continued to purchase tomatoes for L&P from his home (Tr. 446). After Mr. Gentile left "the walk," he continued to be compensated on a joint account basis, but at a reduced rate of 15 per centum of the profits and losses (Tr. 447).

8. Dirtbag Trucking Corporation [hereinafter Dirtbag] was a corporation which was formed in 1989 when Mr. Goodman decided to enter the trucking business (Tr. 2089-90). In November 1989, Mr. Goodman and Mr. Gentile each were issued 75 shares of Dirtbag's stock (RX 2; Tr. 2102-03). In January 1991, Mr. Goodman and Mr. Gentile each loaned Dirtbag $40,000 to enable Dirtbag to purchase two trucks (RX 4 and 5; Tr. 2121, 2780). In return for the loans, Messrs. Goodman and Gentile each obtained a security interest in Dirtbag's assets. The security agreements required Dirtbag to repay the loans by August 18, 1994 (RX 4 and 5). However, Dirtbag never repaid the loans (Tr. 2130, 2499). Dirtbag never had its own office, but was operated from Respondent's office (Tr. 2047). Dirtbag always had a cash flow problem. Respondent advanced money to Dirtbag on a number of occasions (CX 55 at 1-3; Tr. 2049), often paying Dirtbag's creditors directly (Tr. 1585). Dirtbag was never a very profitable company (Tr. 1564, 2495-96). In fact, Mr. Goodman called Dirtbag "a loser" (Tr. 2149). Mr. Goodman became very disgusted with Dirtbag because it was not

making money, and he sold Dirtbag's trucks (Tr. 2050). The last truck was sold in 1994 (Tr. 2498).

9. In approximately January 1991, Mr. Gentile transferred his 75 shares of stock in Dirtbag to Mrs. Gentile (RX 2; Tr. 2827). On February 20, 1991, Mrs. Gentile entered into a written agreement to sell her 75 shares of Dirtbag stock to Mr. Goodman for $80,000 (RX 3; Tr. 2926). The agreement provides that the stock would be placed in escrow with Respondent's attorney, Mr. Mandell, and that Mr. Goodman would pay $25,000 per year to Mrs. Gentile in monthly installments for the next 2 years. After each $25,000 payment, 25 shares of Mrs. Gentile's Dirtbag stock would be released from escrow to Mr. Goodman. The agreement also provides that the final payment of $30,000 would be made by January 31, 1994, at which time the remaining 25 shares of Dirtbag stock would be released from escrow. Upon payment of the final $30,000, Mr. Gentile's $40,000 loan to Dirtbag would be released or assigned to Mr. Goodman. (RX 3.) Mrs. Gentile was paid the $80,000 by either Mr. Goodman or Respondent, and she authorized three releases of 25 shares of stock each on December 30, 1991, February 14, 1993, and February 2, 1994 (RX 3 at 3-3b; Tr. 2942-43).

10. Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., is an individual whose business mailing address is 219 Eden Road, Stamford, Connecticut 06907 (Letter from Albert Lomoriello to Ms. Favors, filed November 29, 1993; Tr. 1244-45). Mr. Lomoriello is not licensed under the PACA, but, at all times material to this proceeding, was operating subject to the PACA.

11. In approximately December 1991, Mr. Lomoriello became employed by American Banana, a produce firm located at the Hunts Point Market (Tr. 1256). Demetrius Contos, American Banana's vice-president, wanted Mr. Lomoriello to expand American Banana's business (Tr. 313-16). Mr. Lomoriello was to receive 40 per centum of the

profits on the produce that he purchased and to be liable for 40 per centum of the losses (Tr. 1245-46). Mr. Lomoriello purchased tomatoes from Respondent for American Banana (Tr. 1263).

12. In approximately January 1993, USDA received a telephone complaint about Respondent (Tr. 69, 81). The caller said that Mr. Goodman had been making payments to Mr. Gentile while Mr. Gentile was buying for L&P (Tr. 84). Ms. Joan Colson, an auditor for the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, and Mr. David Nielson, a PACA Branch employee under Ms. Colson's supervision, were assigned to audit Respondent for Complainant (Tr. 69-70). On February 25, 1993, Ms. Colson and Mr. Nielson met with Mr. Goodman, who provided Respondent's records (Tr. 78).

13. Respondent maintains a file jacket for each produce transaction. The file number on the jacket includes a two-letter prefix which corresponds to the buyer's initials. All documents related to the transaction are filed in the jacket and information regarding the transaction is recorded on the front and back portions of the file jacket. (Tr. 80.)

14. Ms. Colson and Mr. Nielson examined Respondent's file jackets relating to Respondent's sales to L&P and found 81 file jackets that raised questions about improper payments (CX 8-CX 42; Tr. 109). All 81 of these file jackets concern sales of tomatoes to L&P by Mr. Goodman and the numbers on each of these file jackets are prefixed "SG" for "Steve Goodman" (Tr. 80). Each file jacket has handwritten notations on its front and back covers and contains documents pertinent to the transactions to which the file jacket relates (Tr. 80, 131-32). These file jackets also contain a total of 35 checks or check skirts showing payments from Respondent to "A. Gentile" (Tr. 111-13). The reverse side of the checks are endorsed "A. Gentile, payable to JSG Trading" (Tr. 122). These endorsements were actually written by Marsha Levine, Respondent's bookkeeper (Tr. 1705).

15. The top portion of the back cover of each of the 81 file jackets show revenues from the produce transactions to which the file jacket relates and the bottom portion of the back cover of each of the 81 file jackets show expenses related to the produce transactions to which the file jacket relates. The expenses sections list checks issued to "A. Gentile." The notations regarding these checks correspond to actual checks payable to "A. Gentile" or the check skirts applicable to checks payable to "A. Gentile" which were found in the file jackets. (Tr. 127-30.)

16. At first, Mr. Goodman told Ms. Colson and Mr. Nielson that "A. Gentile" was a fictitious name and that he (Mr. Goodman) would give receipts to Ms. Levine for various functions, such as having his car washed, and she would expense them to the files using the name, or notation, "A. Gentile" (Tr. 129, 1038-39). Mr. Goodman later admitted that "A. Gentile" was the name of a person, but insisted that "L&P" or any name, even that of Ms. Colson, could be substituted for "A. Gentile" (Tr. 1039). Mr. Goodman stated that Respondent utilized "A. Gentile," a person's name, on the checks to enable Ms. Levine to endorse and redeposit the checks (Tr. 1039).

17. Mr. Goodman told Ms. Colson that the use of checks to "A. Gentile," which were redeposited into Respondent's account, was his method of keeping track of, or making up, losses that he incurred from sales to L&P. Mr. Goodman also told Ms. Colson that if a file contained checks to Mr. Gentile that were not redeposited into Respondent's account, that money was for services that Mr. Gentile had provided to him. (Tr. 242.)

18. Some of the file jackets reflecting Respondent's sales to L&P contain a slip of paper on which the check to "A. Gentile" is noted (e.g., CX 13B at 8; Tr. 137). Ms. Levine told Ms. Colson and Mr. Nielson that she wrote this information to indicate Respondent's expense for the file jacket (Tr. 137).

19. Ms. Colson prepared a table reflecting the numbers of Respondent's files that she randomly selected, the numbers of the checks issued by Respondent that they contain, and the total amounts that each file shows as payments to "A. Gentile" (CX 7; Tr. 110).

20. When asked by Ms. Colson about notations written in the corners of the backs of file jackets, such as "Tony $2.00" (CX 13B at 1; Tr. 132-33), Mr. Goodman stated that he makes many notes on his file jackets (Tr. 132-33). With respect to each of these files, the number of boxes of tomatoes in the load multiplied by the amount noted on the back of the file jacket associated with the name "Tony" equals the amount of money shown on the file jacket as an expense relating to "A. Gentile" (Tr. 145-46).

21. Respondent maintains a Closed File Journal (CX 53). Each week, after one of Respondent's files was closed, Ms. Levine would summarize that file's information in the journal (Tr. 226). The "Open SC" column refers to "open split commissions" (Tr. 226). Mr. Goodman stated that the "Open SC" column reflects what he paid to someone who provided a service to him (Tr. 227). All of the references to payments to "A. Gentile" in Respondent's file jackets are noted in Respondent's Closed File Journal under the "Open SC" column corresponding to the date that the transaction occurred (Tr. 228). The relationships between payments to "A. Gentile" recorded in the file jackets and the listings in the "Open SC" column in Respondent's Closed File Journal are set forth in a table prepared by Ms. Colson (CX 52; Tr. 228-35).

22. Respondent also maintains a General Ledger Chart of Accounts (CX 6; Tr. 106-07). This computer-generated record lists accounts contained in Respondent's general ledger, the number assigned to each account, and a description of the account (Tr. 107). Account number 108 is "LOANS & EXCHANGES" (CX 6). This account records loans made by Respondent (Tr. 2053-54).

23. Respondent also maintains a General Ledger Journal Entry Edit Report (CX 13A at 3; Tr. 146). This computer-generated document describes how Respondent's financial transactions are maintained in Respondent's general ledger (Tr. 1765). Respondent's General Ledger Journal Entry Edit Report reflects that Ms. Levine recorded 16 of the 35 checks made payable to "A. Gentile" in Respondent's loans and exchanges account as "L/E Tony" (CX 13A at 3, CX 14A at 3, CX 17A at 3, CX 28A at 3, CX 29A at 3, CX 30A at 3, CX 31A at 3, CX 32A at 3, CX 33A at 3, CX 34A at 3, CX 35A at 3, CX 36A at 3, CX 37A at 3, CX 38A at 3, CX 39A at 3, and CX 42A at 3).

24. Ms. Colson obtained a spreadsheet from Ms. Levine or from Respondent's accountant, Mr. Daily, which details the 1992 transactions in Respondent's loans and exchanges account (CX 55 at 1-3; Tr. 158, 1605). The spreadsheet contains 13 columns, reflecting various individuals or firms to whom Respondent had loaned money (Tr. 2054-56). The eight "A. Gentile" checks issued in 1992 which are described in the General Ledger Journal Entry Edit Report as "L/E Tony" and a $38,475.30 boat payment to Midlantic Bank, are noted in the column headed "L&P" and reflect a reduction of Mr. Gentile's debt payable to Respondent (CX 55 at 1-3; Tr. 161, 215-16).

25. Ms. Colson telephoned Mr. Daily on March 11, 1993, with questions about Respondent's loans and exchanges account and the spreadsheet that reflected that account (CX 55 at 1-3). Ms. Colson took notes during that conversation (CX 76). Mr. Daily told Ms. Colson that "L/E" in Respondent's records refers to Respondent's loans and exchanges account and "Tony" refers to Mr. Gentile (CX 76; Tr. 149-50). Mr. Daily stated that Mr. Gentile had a loan with Respondent (CX 76; Tr. 158) and that Mr. Daily included the amounts of the checks for "L/E Tony" in the spreadsheet under the column headed "L&P" (CX 76; Tr. 160, 1617-21). On April 1, 1993, Ms. Colson requested Mr. Daily to provide

an audit trail for the spreadsheet (CX 77; Tr. 159). Mr. Daily enclosed this information in a May 13, 1993, letter (CX 75). The audit trail restates the information contained in the spreadsheet (CX 55 at 4-6; Tr. 166).

26. Respondent maintains an Accounts Receivable Aged Analysis Report, a computer-generated report showing the status of Respondent's accounts receivable for its customers on a monthly basis (CX 51; Tr. 252). The report indicates that when L&P was rebilled for a product (such as on CX 25B at 1, where L&P was rebilled from $5,001.35 to $3,251.75), the rebilled price would be noted in the Accounts Receivable Aged Analysis Report for L&P, and a credit memo would be issued canceling L&P's accounts receivable for the original price (CX 51 at 117; Tr. 254). None of the 16 "A. Gentile" checks found by Ms. Colson that are referenced in the General Ledger Journal Entry Edit Report as "L/E Tony" are listed in Respondent's Accounts Receivable Aged Analysis Report (Tr. 258). All of the remaining 19 "A. Gentile" checks found by Ms. Colson (such as on CX 25B at 1 for $129.60), are listed in the Accounts Receivable Aged Analysis Report for L&P, with the amount of the check noted as a "customer charge" and the check itself noted as "payment received" (Tr. 256-57).

27. Respondent's General Ledger Journal Entry Edit Reports for 1992 and 1993 show that Respondent issued checks as payments to Mr. Gentile (Tr. 171-93). These checks are described in the General Ledger Journal Entry Edit Reports as follows: check number 3941 for $467.59 as "Steve's Loan, Tony's Boat" (CX 54 at 1-2); check number 1847 for $38,475.30 as "L/E Tony" (CX 54 at 3-5); check number 3899 for $806.51 as "Steve's Loan Tony's Car" (CX 54 at 6-9); check number 3975 for $806.51 as "Steve's Loan Tony's Car" (CX 54 at 10-14); check number 4051 for $800 as "L/E Dirtbag for Tony's Car" (CX 54 at 14-17); and check number 2151 for $3,317 as "Steve's Loan Tony's Watch" (CX 54 at 18). Respondent's General Ledger Journal Entry

Edit Reports also show Respondent's payment of $6,400 as "L/E Tony" (CX 54 at 19).

28. Respondent's records show that Respondent's check number 1847, dated June 5, 1992, was issued to Midlantic National Bank for $38,475.30 (CX 54 at 3; Tr. 182). Midlantic National Bank's records reveal that this check was in payment for a boat loan owed by Mr. Goodman (CX 73; Tr. 186). The boat was a Trojan model that Mr. Goodman had purchased in 1987 for approximately $45,000 to $50,000 (Tr. 2791). Beginning in November or December 1990, Mr. Goodman allowed Mr. Gentile to use the boat with the understanding that Mr. Gentile would pay for the boat's maintenance (Tr. 2791). In August 1992, Mr. Goodman sold the boat, then titled to Mr. Goodman's wife, Jill, to Mr. Gentile for $10,000 (CX 57). The boat needed work but was described by Mrs. Gentile as "nicely laid out" (Tr. 2930). Mr. Gentile told Louis Beni, secretary-treasurer of L&P, that he was getting a very good price for the boat (Tr. 2888).

29. Respondent's records contain check numbers 3899 and 3975 issued to Mercedes-Benz Credit Corporation and check number 4051 issued to Dirtbag for "L/E Dirtbag for Tony's Car" (CX 54 at 6, 10, 14-15; Tr. 198). Documents obtained from Mercedes-Benz Credit Corporation show that a new 1990 Mercedes 300 SEL was leased to Mr. Gentile on May 11, 1990, for 48 months, with monthly payments of $798.99, for a total of $38,351.52 (CX 56 at 3-5; Tr. 198-99). Although a corporate resolution was prepared by Dirtbag and signed by Mr. Goodman and Mr. Gentile, which authorized Mr. Gentile to lease the car on behalf of Dirtbag (CX 56 at 2), the documents reflecting the lease do not mention Dirtbag. When Mr. Goodman presented the leased Mercedes to Mr. Gentile, Mr. Goodman placed a large red ribbon on it (Tr. 2828, 2838-39). Mr. Beni knew that Mr. Gentile obtained the Mercedes through Dirtbag (Tr. 2883, 2901).

30. Respondent's check number 2151, dated July 28, 1992, for $3,317, was issued to a jewelry store in payment for

a Rolex watch which Mr. Goodman gave to Mr. Gentile. Mr. Goodman testified that the watch was a gift. (RX 40; Tr. 2478-80.) Mr. Beni knew about Mr. Goodman's gift of the watch to Mr. Gentile (Tr. 2835-36).

31. Respondent's payroll records for 1992 show that Mrs. Gentile received wages (CX 50 at 1-2; Tr. 265-66). Two of the check stubs for these payments to Mrs. Gentile contain the letters "comm" which refers to "commission" (CX 50 at 3-12; Tr. 268).

32. After Ms. Colson left Respondent's premises and returned to Washington, DC, she found that several of Respondent's file jackets relating to sales to L&P contain statements from G&T (CX 44A at 4, CX 45A at 4, CX 46 at 4, CX 47A at 4, CX 48A at 4, CX 49A at 3; Tr. 271). Two of the file jackets containing statements from G&T also contain adding machine tapes (CX 44B at 20, CX 46 at 5) which reflect amounts that correspond to the total of the packages noted in the G&T statements multiplied by 5 cents per package (Tr. 272-83). File jacket number SG 4222 in which a G&T statement was found shows a payment to "A. Gentile" which corresponds to the total on the adding machine tape (CX 44B at 1-2; Tr. 281). The "A. Gentile" notation also corresponds to the amount of the check payable to Mrs. Gentile found in the file and the amount noted in Respondent's payroll records as wages paid to Mrs. Gentile (CX 44A at 1, CX 50 at 1; Tr. 281-82). Many of Respondent's file jackets, reflecting sales to L&P, contain a notation "Tony 5¢" (Tr. 282). The file jacket numbers containing the notations "Tony 5¢" are the same numbers as those in G&T's statements (Tr. 283). The checks to Mrs. Gentile and their relationships to the files noted in G&T's statements are listed in a table prepared by Ms. Colson (CX 43).

33. Respondent's records also contain 22 file jackets concerning Respondent's sales of tomatoes to American

Banana which have notations on the backs of the file jackets similar to those reflecting sales to L&P (CX 63A-CX 69A; Tr. 549-51). The notations indicate that payments per box were made to "Al" as well as to "HPT" or "Hunts Point Produce" in an amount equal to the amount of the notation multiplied by the number of boxes sold to American Banana. The file jackets contain seven of Respondent's checks totaling $9,733.45 made payable to Hunts Point Produce Co. (CX 63A at 1, CX 64A at 1, CX 65A at 1, CX 66A at 1, CX 67A at 1, CX 68A at 1, CX 69A at 4; Tr. 550, 553-54).

34. These 22 file jackets also contain several invoices from Hunts Point Produce Co. to Respondent in amounts that correspond to the amounts of the checks issued to Hunts Point Produce Co. The Hunts Point Produce Co. invoices contain Respondent's file numbers which correspond to the file numbers that were written on checks payable to Hunts Point Produce Co. or check skirts applicable to checks payable to Hunts Point Produce Co. that were found in the file jackets (CX 63B at 3-4, CX 63C at 4-5, CX 64B at 3-4, CX 64C at 3-4, CX 65B at 4-5, CX 65C at 4-5, CX 65D at 4-5, CX 65E at 3-4, CX 65F at 3-4, CX 65G at 3-4, CX 66B at 4-5, CX 66C at 4-5, CX 66D at 3-4, CX 67B at 3-4, CX 67C at 3-4, CX 67D at 4-5, CX 68B at 6-7, CX 68C at 4-5, CX 68D at 4-5, CX 68E at 4-5, CX 69A at 4-5; Tr. 554-59). Ms. Colson prepared a table that summarizes this information (CX 62).

35. Ms. Colson recognized that the address of Hunts Point Produce Co. was also Mr. Lomoriello's address (Tr. 559-60). In answer to Ms. Colson's question as to why Mr. Lomoriello was receiving money from Respondent, Mr. Goodman replied that Mr. Lomoriello gave inside information to Mr. Goodman and performed various tasks for him at the Hunts Point Market (Tr. 559-60).

36. Respondent's Closed File Journal, under the "Open SC" column, reflects the amounts of the checks written by Respondent to Hunts Point Produce Co. (CX 53; Tr. 604-05).

Ms. Colson prepared a table showing the references in Respondent's Closed File Journal for the payments to Hunts Point Produce Co. (CX 71; Tr. 629-30).

37. Ms. Colson and another PACA official interviewed Mr. Contos, American Banana's vice-president. Mr. Contos stated that Mr. Lomoriello was compensated by receiving 40 per centum of the profits on his transactions (Tr. 607). Mr. Contos stated that if Mr. Lomoriello was receiving payments from Respondent for produce sold to American Banana, he (Mr. Contos) expected Mr. Lomoriello to repay American Banana 60 per centum of the money that he had received from Respondent (Tr. 607).

38. Ms. Colson and her associate, Mr. Summers, also interviewed Patrick Prisco, L&P's president (Tr. 637). Mr. Prisco was unaware that Respondent's payments to Mr. Gentile were being recorded in Respondent's files associated with Respondent's sales to L&P (Tr. 458-64).

Discussion of the Evidence

I. Respondent's Payments to Mr. Gentile.

Complainant has provided extensive evidence that in 1992 and early 1993, Respondent made a series of payments and transferred items of value to Mr. Gentile either directly, or through his wife, Gloria Gentile, or through G&T, a corporation owned by Mrs. Gentile and established only for tax purposes (Tr. 448, 2829, 2948, 3216). At the time that these payments were made, Mr. Gentile was buying tomatoes from Respondent for L&P (Tr. 2170-71).

Respondent's payments to and transfer of items of value to Mr. Gentile included: (1) the use of a boat and eventual purchase of that boat at a price substantially below its value; (2) a gift of a Mercedes automobile; (3) a gift of a Rolex watch; (4) payments to Mr. Gentile through Mrs. Gentile; and

(5) 35 checks issued to Mr. Gentile. Each of these payments and items had a value that was more than *de minimis*.

A. The Boat, The Mercedes, and The Rolex Watch.

Complainant did not introduce sufficient evidence to prove that: (1) Respondent's allowing Mr. Gentile to use a boat or sale of the boat at a price below its value was designed to induce Mr. Gentile to purchase tomatoes from Respondent; (2) Respondent's gift of a Mercedes to Mr. Gentile was designed to induce Mr. Gentile to purchase tomatoes from Respondent; or (3) Respondent's gift of a Rolex watch to Mr. Gentile was designed to induce Mr. Gentile to purchase tomatoes from Respondent. Further, I find that Mr. Beni, a principal of L&P, knew of the sale of the boat at a price below its value, knew of the gift of the Mercedes, and knew of the gift of the Rolex watch. Thus, I do not find that Respondent's allowing Mr. Gentile use of the boat, Respondent's sale of the boat to Mr. Gentile for a price below its value, Respondent's gift of the Mercedes, or Respondent's gift of the Rolex watch constitute violations of section 2(4) of the PACA.

B. Respondent's Payments to Mrs. Gentile.

Respondent's payroll records for 1992 indicate that Mrs. Gentile received wages from Respondent (CX 50 at 1-2; Tr. 265-66). Two of the check stubs relating to checks issued to Mrs. Gentile indicate that the checks were written for "comm" which Ms. Levine stated refers to "commission" (CX 50 at 3-12; Tr. 268). Ms. Levine explained that Mrs. Gentile was paid for providing services to Respondent as an informant (Tr. 270-71).

The amounts of the checks to Mrs. Gentile relate to deductions of 5 cents for each box of tomatoes sold by Respondent to L&P. In several of Respondent's file jackets relating to sales to L&P, Ms. Colson found what appeared to be statements from G&T (CX 44A at 4, CX 45A at 4, CX 46

at 4, CX 47A at 4, CX 48A at 4, CX 49A at 3; Tr. 271). In two of the file jackets that contain G&T statements, Ms. Colson found adding machine tapes (CX 44B at 20, CX 46 at 5) that seemed to add packages, corresponding to the number of packages noted in the G&T statements, and multiply the total number of packages by 5 cents per package (Tr. 272-83). Ms. Colson also noticed that file jacket number SG 4222 in which a G&T statement was found shows a payment to "A. Gentile" which corresponds to the amount on the adding machine tape (CX 44B at 1-2; Tr. 281). The amounts of the "A. Gentile" payments shown on the file jackets also correspond to the amounts of checks to Mrs. Gentile noted in Respondent's payroll records (Tr. 281-82). Ms. Colson further noticed that many of Respondent's file jackets, reflecting sales to L&P, contain a notation "Tony 5¢" (Tr. 282). The file jackets containing the notations "Tony 5¢" have the same numbers as those on the statements of G&T (CX 44B at 1-2; Tr. 283).

After Ms. Colson presented this evidence at the hearing, Ms. Levine provided a completely different explanation for the checks payable to Mrs. Gentile. According to Ms. Levine, Mr. Goodman ordered Respondent's employees to write "Tony 5¢" on every L&P file jacket to pay Mrs. Gentile for Mr. Goodman's purchase of her stock in Dirtbag (Tr. 1715).

However, Respondent's claim that the checks to Mrs. Gentile were for her Dirtbag stock is inconsistent with the fact that the checks are listed in Respondent's payroll records as wages and the fact that two of the check stubs indicate that the checks issued to pay Mrs. Gentile were for commissions. At the hearing, Ms. Levine stated that noting the checks to Mrs. Gentile on Respondent's payroll records was an error (Tr. 1941). However, this explanation was never given to Ms. Colson. This alleged error also came as a complete surprise to Mr. Daily, who testified that he had sent 1099 tax forms to Mrs. Gentile in 1991 and 1992, based upon his assumption that she was a salaried employee of Respondent (Tr. 1541-42,

1595). In mid-1993, after Mr. Daily submitted Respondent's tax return for 1992, he was told by Ms. Levine that Mrs. Gentile was not an employee (Tr. 1561-62). Ms. Levine testified that when Mr. Daily heard this, he "went through the roof" because the 1099 tax forms had been improperly issued (Tr. 1940). Mr. Daily then was requested to file an amended personal tax return for Mr. Goodman, which he did just before the hearing (Tr. 1601-02).

Ms. Levine's contention that she erred in noting Mrs. Gentile's "wages" in Respondent's payroll records is further contradicted by her testimony that, as of late 1992, before she allegedly learned of her error in treating the payments to Mrs. Gentile as wages, Ms. Levine was aware that Mr. Lomoriello could not be entered in Respondent's books as a wage earning employee, or else Respondent would be required to send a 1099 tax form to Mr. Lomoriello (Tr. 1965).

The record does contain evidence that 75 shares of Dirtbag stock were transferred by Mrs. Gentile to Mr. Goodman. In early 1991, Mr. Gentile transferred his 75 shares of stock in Dirtbag to Mrs. Gentile (RX 2 at 7-9a; Tr. 2827), and on February 20, 1991, Mrs. Gentile agreed in writing to sell the 75 shares to Mr. Goodman for $80,000 (RX 3 at 1; Tr. 2926). The agreement (RX 3 at 1) provided that the stock would be placed in escrow with Respondent's attorney and that Mr. Goodman would pay $25,000 per year to Mrs. Gentile in monthly installments for the next 2 years. After the payment of each $25,000, 25 shares of Mrs. Gentile's Dirtbag stock would be released from escrow to Mr. Goodman. The final payment of $30,000 was to be made by January 31, 1994, at which time the remaining 25 shares of Dirtbag stock would be released from escrow. Upon payment of the final $30,000, Mr. Gentile's $40,000 loan to Dirtbag would be released or assigned to Mr. Goodman. Mrs. Gentile authorized three releases of 25 shares of stock each on December 30, 1991, February 14, 1993, and February 2, 1994 (RX 3 at 3-3b; Tr. 2942-43).

As the United States Court of Appeals for the District of Columbia Circuit states in *JSG Trading Corp. v. United States Dep't of Agric., supra*, 176 F.3d at 540, neither Complainant nor Respondent offered a valuation expert regarding the value of Dirtbag. However, there was considerable testimony from Mr. Daily, Ms. Levine, and Mr. Goodman attesting to Dirtbag's constant financial problems (Tr. 1564, 1984-85, 2049, 2148-49, 2495-96). Mr. Gentile had only loaned Dirtbag $40,000 and had invested approximately $7,000 in a new truck (Tr. 2782-83). Respondent's payments, therefore, would have included a profit of approximately $33,000.

Mr. Goodman acknowledged that, if Respondent sold more tomatoes to L&P during the period that the 5 cents per box deductions were to be made, Mrs. Gentile would receive the $80,000 more quickly (Tr. 2495). Mr. Gentile, thus, had an incentive to purchase as many of Respondent's tomatoes as possible.

I find that Complainant introduced substantial evidence to show that Respondent's payment to Mrs. Gentile, by deducting 5 cents for each box of tomatoes that Mr. Gentile purchased on behalf of L&P, was intended to induce Mr. Gentile to buy tomatoes from Respondent. Respondent's evidence that these payments were for Mrs. Gentile's services or for Dirtbag stock is not credible and does not rebut the evidence that Respondent's payments were intended to induce Mr. Gentile to purchase tomatoes from Respondent.

C. Respondent's Payment to G&T.

On January 30, 1992, Respondent issued a check made payable to G&T in the amount of $5,600 (RX 34). Ms. Levine contended this check was in payment for services rendered by Mrs. Gentile to Respondent and Mr. Goodman, although Ms. Levine never knew what kind of services these were (Tr. 2042-43). Mrs. Gentile said the $5,600 was for

checking out tomato fields in Florida, where she and Mr. Gentile had their winter home (Tr. 2911). However, Mrs. Gentile admitted that she and Mr. Goodman never had any written agreement as to exactly what she would do and how much she would be paid (Tr. 2932-34). No documentation was ever provided to justify the $5,600 payment.

I find that Complainant introduced substantial evidence to show that Respondent's payment of $5,600 to Mrs. Gentile was intended to induce Mr. Gentile to buy tomatoes from Respondent. Respondent's evidence that the $5,600 payment was for Mrs. Gentile's services is not credible and does not rebut the evidence that Respondent's payment was intended to induce Mr. Gentile to purchase tomatoes from Respondent.

D. The 35 Checks to "A. Gentile."

Respondent's payments to Mr. Gentile also include 35 checks, totaling $62,535.60 (CX 7), which Respondent issued to "A. Gentile." Respondent refers to these checks as "circular checks" because they were redeposited to Respondent's bank account. However, Respondent's records show that the 35 checks were treated as if Mr. Goodman was sharing his profit with Mr. Gentile. Further, 16 of the checks were shown in Respondent's records as reducing the debt that Mr. Gentile owed to Respondent.

The 35 checks to "A. Gentile" were found in file jackets that Ms. Colson examined (CX 8-CX 42; Tr. 109-13). All of the file jackets concern sales of tomatoes by Respondent to L&P. Mr. Goodman represented Respondent in all of the transactions since all of the file numbers contain the prefix "SG" (Tr. 80). Each file jacket contains handwritten notations and supporting documents (CX 8-CX 42; Tr. 132). The reverse sides of the 35 checks contain the endorsement "A. Gentile, payable to JSG Trading," which Ms. Levine wrote (Tr. 122, 1705). Some of the file jackets also contain a slip of paper on which the payment to "A. Gentile" is noted (CX

13B at 8; Tr. 137). Ms. Levine told Ms. Colson that she recorded this information to indicate Respondent's expenses for the file jacket (Tr. 137).

The top portion of the back cover of each of the 81 file jackets show revenues from the produce transactions to which the file jacket relates and the bottom portion of the back cover of each of the 81 file jackets show expenses related to t produce transactions to which the file jacket relates (Tr. 127). The revenues sections show the amounts that Respondent's customer was billed for the produce and how much the customer paid (Tr. 127-28). The expenses sections show from whom Respondent purchased the produce, the date of purchase, the seller's invoice number, the date that Respondent made payment, Respondent's check number, and the amount of the check. The expenses sections also show incidental expenses, such as freight. The expenses sections for the files in question show payments to "A. Gentile" in the same amounts as the checks to "A. Gentile" found by Ms. Colson (Tr. 128-30).

When Ms. Colson asked Mr. Goodman what "A. Gentile" listed on the file jackets meant, Mr. Goodman was evasive. At first, he stated that he would give Ms. Levine receipts for various functions, such as having his car washed, and she would expense them to the files and that "A. Gentile" was a fictitious name (Tr. 129, 1038-39). He later admitted that "A. Gentile" was the name of a person, but insisted that "L&P" or any name, even that of Ms. Colson, could be substituted for "A. Gentile" (Tr. 1039).

Mr. Goodman told Ms. Colson that the checks payable to "A. Gentile," which were deposited into Respondent's account, were his way of keeping track of, and making up, losses that he incurred from sales to L&P and that if checks payable to Mr. Gentile were not deposited into Respondent's account, they were for services that Mr. Gentile had provided to him (Tr. 242).

Ms. Colson asked Mr. Goodman about notations written in the corners on the back of the 35 file jackets (CX 13B at 1; Tr. 132-33). Mr. Goodman again was evasive, stating that he made many notes on his file jackets (Tr. 132-33). The number of boxes of tomatoes in the load, multiplied by the amount noted on the back of the file jacket, associated with the name "Tony" equals the amount on the file jacket shown as an expense to "A. Gentile" (Tr. 145-46).

1. The 35 Checks Were Treated as a Profit Split Between Mr. Goodman and Mr. Gentile and 16 of the Checks Were Treated as a Reduction of the Debt Which Mr. Gentile Owed to Respondent.

Respondent's records show that the 35 "A. Gentile" checks obtained by Ms. Colson were treated as a profit split between Mr. Goodman and Mr. Gentile. Further, 16 of the 35 checks were shown in Respondent's records as reducing the debt owed by Mr. Gentile to Respondent.

Respondent's Closed File Journal contains a column entitled "Open SC" which refers to "open split commissions." At the end of each week, Ms. Levine would reduce Mr. Goodman's profit by the amounts set forth in the "A. Gentile" checks (Tr. 1890-97). All 35 of the "A. Gentile" checks were noted in Respondent's Closed File Journal under the "Open SC" column corresponding to the dates of the transactions (Tr. 228-29). This evidence establishes that Respondent was treating these 35 checks to "A. Gentile" as a sharing of Mr. Goodman's profit.

Further, Ms. Colson found that 16 of the 35 checks were treated in Respondent's records as payments to reduce a debt that Mr. Gentile owed to Respondent. In Respondent's General Ledger Journal Entry Edit Report (CX 13A at 3; Tr. 146), a computer-generated document that reflects how Respondent's financial transactions are recorded in Respondent's general ledger (Tr. 1765), Ms. Colson found that the 16 checks were entered into one of Respondent's

accounts described as "L/E Tony" (CX 13A at 3, CX 14A at 3, CX 17A at 3, CX 28A at 3, CX 29A at 3, CX 30A at 3, CX 31A at 3, CX 32A at 3, CX 33A at 3, CX 34A at 3, CX 35A at 3, CX 36A at 3, CX 37A at 3, CX 38A at 3, CX 39A at 3, and CX 42A at 3). The number of the account under which the 16 checks were entered is "108," which is identified in Respondent's General Ledger Chart of Accounts as loans and exchanges (CX 6).

During Ms. Colson's investigation, she obtained a spreadsheet from Ms. Levine or from Mr. Daily detailing the 1992 transactions in Respondent's loans and exchanges account (CX 55 at 1-3; Tr. 158, 1605). The spreadsheet contains 13 columns reflecting various individuals or firms to whom Respondent had loaned money (Tr. 2054-56). One of these columns is entitled "L&P" (Tr. 160-01, 1617-21). Ms. Colson found that the eight checks issued in 1992 to "A. Gentile" described in the General Ledger Journal Entry Edit Report as "L/E Tony" and the $38,475.30 boat payment to Midlantic Bank, are noted in the 1992 spreadsheet as a reduction of Mr. Gentile's debt payable to Respondent (CX 55 at 1-3; Tr. 161, 215-16).

Ms. Colson telephoned Mr. Daily on March 11, 1993, with questions about Respondent's loans and exchanges account and the spreadsheet that reflects the account (CX 55 at 1-3). Ms. Colson took notes during this conversation (CX 76). Mr. Daily stated that with respect to "L/E Tony," "L/E" referred to Respondent's loans and exchanges account and "Tony" referred to Mr. Gentile (CX 76; Tr. 149-50). Mr. Daily told Ms. Colson that Mr. Gentile had a loan payable to Respondent (CX 76; Tr. 158). The references to "L/E Tony" contained in Respondent's general ledger were set forth in the column in the spreadsheet under the heading "L&P" (CX 76). Mr. Daily also provided an audit trail which supported the information contained in the spreadsheet (CX 55 at 4-6; Tr. 166).

At the hearing, Mr. Daily claimed that when Ms. Colson asked him what "L/E Tony" meant, he told her "these entries look like there's a loan to Tony, but that I would have to look into it" (Tr. 1520). However, Ms. Colson's notes of their March 11, 1993, telephone conversation indicate that Mr. Daily unambiguously stated that the "L/E" reference designated a loan to Mr. Gentile. The notes read: "Q. If the check stub denotes 'L/E Tony' then this would be a loan to Mr. Gentile and show up under L&P on the L/E schedule.- That's correct." (CX 76.)

Mr. Daily also testified at the hearing that, after Ms. Colson's investigation, he spoke with Ms. Levine about the "L/E Tony" references and he decided to remove them from the "L&P" column in the spreadsheet (Tr. 1532, 1656-57). However, Mr. Daily never informed Complainant that the information contained in the spreadsheet or in the audit trail would be changed to remove the "L/E Tony" references from the "L&P" column (Tr. 634-35, 1657), nor did Respondent ever make available or submit into evidence a revised version of the spreadsheet reflecting these alleged changes (Tr. 1660). I, therefore, conclude that Mr. Daily treated the "L/E Tony" references as reductions of debts that Mr. Gentile owed to Respondent.

It is clear that 16 of the 35 "A. Gentile" checks were treated by Respondent as reductions of Mr. Gentile's debt payable to Respondent. The other 19 checks also constitute a sharing of Mr. Goodman's profits on the sales of tomatoes to L&P. I find that Complainant introduced substantial evidence to establish that Respondent issued each of these checks to induce Mr. Gentile to purchase tomatoes from Respondent.

2. Respondent's Contention that the Checks Payable to "A. Gentile" Were Issued to Adjust L&P's "Clips" is Not Credible.

Respondent contends that the checks were not issued to induce Mr. Gentile to purchase tomatoes from Respondent.

Specifically, Respondent contends that the checks payable to "A. Gentile" relate to an arrangement with L&P regarding "clips." Ms. Levine testified that the checks payable to "A. Gentile" were used by Respondent as part of a system to adjust L&P's files because of L&P's "clipping" of Respondent's invoices. A "clip" would result in L&P paying less than Respondent's invoice price. Ms. Levine testified as follows:

[BY MR. MANDELL:]

Q. Would you tell us what clips are in your understanding.

[BY MS. LEVINE:]

A. Okay.

Q. With regard to L&P.

A. Yes. As I understand it what was happening was he would—they would make let's say or how can I explain it. They would take some money off—they would underpay us on one invoice and then Mr. Goodman would add that onto a different file and we were keeping track like that. This is how we had set up the system. What we were doing we were taking a check and now this was one. This was a check that we were making up a clip.

So we cut the check but we re-deposited it. We kept the money. We just kept track. We had a journal that we kept track. We had a list that we were keeping track of clips of how much L&P owed us. Usually they owed us and that is why we were doing it like this.

Q. Miss Levine, why were you doing this with checks?

A. Well, because Mr. Goodman wanted to keep a record. This way if we ever had any problem we could always say well these are the checks that we had. On this particular file we made up $320. This way we always

> had a check and we kept them and they came to us in our bank statement and we always were able to find them. We said we had this check, this check, this check, this check and this is how much they totaled up.

Tr. 1705-06.

Ms. Levine stated that when one of Respondent's customers had a problem with a load and "clips" an invoice and Respondent did not object to the "clip," Respondent would rebill the customer at a lower price (Tr. 249-50, 2063-64).

However, Ms. Levine's attempt to explain how the alleged "clip" system was maintained is not credible. She claimed that she maintained a journal to record L&P's clips balance, that a first journal had been thrown away, and that a second journal became wet when Respondent's basement was flooded early in 1995 (Tr. 1706, 1793-95). She testified that she tried to reconstruct the second journal by copying its figures into another journal because Mr. Mandell, Respondent's attorney, said the information was needed, but she was unable to reconstruct the second journal (Tr. 1772). However, Ms. Levine did not show the alleged second journal to Ms. Colson in February 1993, before it was allegedly damaged by the flood, even though she was served with a demand letter to provide relevant records (Tr. 1798). Further, Ms. Levine did not retain the remains of the journal allegedly damaged by the flood even though the Complaint in this matter had been filed, and she had been told by Respondent's attorney that such a journal would be important evidence (Tr. 1772, 1803-08). Ms. Levine testified that, in attempting to reconstruct the damaged second journal, she began with the most recent clip balance allegedly still owed by L&P, $10,092.65, and worked backward in time (RX 20 at 27; Tr. 1808-09). Ms. Levine stated that the most recent clip balance was provided to her on a piece of paper by Mr. Goodman; however, that piece of paper was never provided at the

hearing (Tr. 1809-13). Without any tangible written evidence that Respondent maintained such a balance, either in a journal or other written record, the "clips" explanation simply is not believable.

The credibility of this alleged arrangement is further weakened by the inability of either Mr. Goodman or Ms. Levine to explain its operation with any clarity. Mr. Goodman testified:

> [BY MR. STANTON:]
>
> Q. Well, this file, [CX] 13[B at 1], indicates a $3200 circular check to A. Gentile under the expenses portion of the file[,] correct?
>
> [BY MR. GOODMAN:]
>
> A. Okay.
>
> Q. It looks like from the file jacket, that this $3200 which you say is equal to the amount of the make-up, correct; is that basically your understanding of how this worked?
>
> A. Pretty close to it, yes.
>
> Q. That this $3200 is being taken away from your commissions?
>
> A. Yes.
>
> Q. Well, if that's the case, then how does this—
>
> A. Wait a minute, excuse me. Marsha Levine needs to explain to you the pluses and adds to my commissions. I'm not going to testify to that because I get confused myself sometimes and she was up here and she explained it to you and she can do a much more accurate job of explaining it than I can.

Tr. 2804.

Mr. Goodman's lack of specific knowledge of how "clips" worked is inconsistent with his meticulous style of record keeping. He testified:

I knew there was some sort of list that she was keeping, but again I knew of no journals. A few times I saw like those yellow pieces of paper. I knew she was keeping some kind of record, and I knew because one time we spoke about it, and she said what happens when I come off of this page. I said to her when the page is done throw it away, because we are not looking to keep a balance from day one that we always had our files. If we ever wanted to go back to find out a figure, we could just take all of the files from whatever, add them up and there is the total add them up and subtract the pluses and minuses.

Tr. 2181.

Ms. Levine also was unable to explain how the system worked. When asked how an "A. Gentile" check that was redeposited into Respondent's account could have affected the balance owed between Respondent and L&P, she was unable to give an adequate explanation. Finally, Mr. Mandell objected on the ground that the questions seemed to "confuse the witness":

[BY MR. STANTON:]

Q. Let's see. How about GS4300. Was that just a make up?

[BY MS. LEVINE:]

A. Yes. That is just a make up.
Q. That is a make up for what 3120?
A. Yes, that is correct.
Q. Now and it is noted in your table [(RX 20)] at page 22 where you have minus 3120?
A. That is correct.
Q. That means that the amount of money that L&P owed JSG at that point was reduced by 3120?
A. That is correct.

Q. So JSG in this particular transaction gained an extra 3120 from L&P in some fashion?

A. Yes.

Q. Now—

A. It is not that we gained. We got back money that they had —

Q. That had lost on other—

A. Right.

Q. Now if you look at this file jacket [(CX 14)], it indicates at the bottom an A. Gentile circular check for 3120 [(CX 14B at 1)].

A. Yes.

Q. And that is under expenses for that particular file.

A. That is correct.

Q. So it looks like it increased the expenses of JSG on that file.

A. Yes.

Q. Now this is what the problem is for me. If this is supposed to be a make up which results in more money coming to JSG from L&P on this particular file, why does it look like on this file that less money the 31[2]0 less money is coming to JSG on this file?

A. Well what I would do is that check somewhere got redeposited probably on another file somewhere on that file we made more money than we were supposed to.

Q. On the other file?

A. Wherever file I wrote, there is no way for me to tell what file I deposited that check on.

Q. The circular check?

A. Yes. I had to redeposit it somewhere.

Q. Okay. So that would balance out the circular check.

A. That would increase—yes.

Q. The circular check didn't really mean anything anyway because it resulted in no gain or loss.

A. That is right.

Q. So by balancing out the circular check, you might decrease the amount of expenses to JSG overall by 3120 by adding the amount of the circular check somewhere on another file jacket; right?

A. When I deposited it, it increased our sales I guess you would say.

Q. The revenues or sales right.

A. Yes.

Q. By 3120 so that would balance out this 3120 negative amount on this file [(CX 14)].

A. That is correct.

Q. But that still wouldn't result in any kind of overall increase to JSG making up for previous loans by L&P would it?

A. We were just getting back the money we were supposed to get.

Q. But if this is a make up, you are supposed to be getting extra money to decrease the loan balance of L&P; isn't that right?

MR. MANDELL: I am going to object because the question seems to confuse the witness.

Tr. 3129-32.

The credibility of this arrangement is also seriously compromised by Mr. Goodman's admitted alteration of documents in anticipation of the hearing. When the hearing reconvened on March 19, 1996, Respondent introduced into evidence copies of hundreds of Respondent's file jackets to assist Ms. Levine in explaining how L&P's alleged clip balance was maintained (RX 53). Included among these file jackets were many in which certain amounts were shown as being deducted from L&P's clip balance by means of the notation "clip." Ms. Levine testified how these file jackets reflected the ongoing nature of Respondent's arrangement with L&P.

However, upon cross-examination of Ms. Levine, it became clear that the word "clip," on at least 12 of these file jackets (SG 4131, 4152, 4211, 4242, 4273, 4314, 4399, 4718, 4876, 5115, 5128, and 5145), had been added after Ms. Colson's investigation. Mr. Goodman later admitted that he personally wrote the word "clip" on the file jackets during the hearing process:

> BY MR. MANDELL:
>
> Q. First of all Mr. Goodman, you were of course present during Miss Levine's testimony and you were reviewing documents with me from RX-53 and some of Complainant's exhibits which show the word clip that appear in some documents and not in others. Can you tell us anything about that?
>
> [BY MR. GOODMAN:]
>
> A. Yes. I wrote the word clip.
>
> Q. When did you do it and why did you do it. I realize it is a compound question.
>
> A. Okay. It was done I believe sometime during the hearing process when we knew we needed this compilation made up and I told Marsha to gather up all of the files or no I take that back. It goes back before the hearing and I gathered up all of the filings, I had seen all of the files and I—
>
> JUDGE BERNSTEIN: In preparing for the hearing?
>
> THE WITNESS: In preparing for the hearing.
>
> JUDGE BERNSTEIN: Okay.
>
> THE WITNESS: And there were just—I was shuffling these same files into so many different categories that it was just getting lost, confused and ridiculous. So I took the files that were clipped files, I wrote on the files not changing anything the word clip.

So this way as I shuffled them around, I could always keep them in piles. I tried to get files that were shared loads that involved clips. So I had files that belonged in two different places. So by writing that, I could always keep track of what was what.

BY MR. MANDELL:

Q. Now Mr. Goodman, did you write anything else on the files?

A. No.

Tr. 3168-70.

Mr. Goodman thus admitted that he altered documents prior to the hearing which his counsel intended to move into evidence. Furthermore, Mr. Goodman did not admit to these alterations until the matter was raised during Ms. Levine's cross-examination. These admitted alterations not only undercut Respondent's contentions with respect to the alleged "clip" arrangements with L&P, but they also detract from Respondent's credibility in general.

I also found unbelievable Mr. Goodman's testimony as to why 5 cents per box was utilized as a "clip." Mr. Goodman answered his lawyer's questions about that as follows:

[BY MR. MANDELL:]

Q. All right. I understand about the length of time but who arrived at the five cents per box out of your commission. Why not 10. Why not 20. Why not some other figure, do you remember?

[BY MR. GOODMAN:]

A. No, I don't as a matter of fact.

Q. Huh?

A. I don't remember. I don't know how that came about.

Q. Pardon.

A. Well first off I know that I wouldn't have wanted to make it too high because I wouldn't want it to have affected my bonus all that much but the difference between a nickel and a dime really doesn't matter. I just think it just came about. It was simple and easy.

Q. Didn't have anything to do with the prior situation where you were trying to make up Tony's clips did it?

A. You know it was easy to—the one nice thing about the nickel for the clips was like I told you whenever we tried to make a half we got wacked back. So a nickel always sailed through pretty easily. Maybe that had something to do with it. It just made sense. It was just something we were [sic] used and we just kept on going with it.

Tr. 2591-92.

Mr. Goodman's explanation as to why L&P's officials had no written record of the "clips" also defies credibility. He stated:

. . . Neither Pat Prisco nor Tony Gentile on a file by file basis ever sat there and went over it file by file as far as where we added or subtracted—well, they always knew their deductions, but they didn't keep track of how I got my money back because he knew I was keeping track and also you just couldn't do it. You had to be very cautious—not cautious, wrong word.

Tr. 2372.

And to the same effect, Mr. Goodman answered:

[BY MR. MANDELL:]

Q. Did you have any conversations with anyone at L&P about the $3 make-up?

[BY MR. GOODMAN:]

A. Well, not specifically on a file by file basis, but Pat Prisco and I had many conversations about the clips, and the pluses and the minuses and the deductions and so forth like that. He was well aware of what we were doing.

I'm not going to say I spoke to Patty on a weekly basis because I did not. Tony Gentile had full control of L&P's tomato business. Tony and I certainly spoke about it often. We fought like cats and dogs about it and again, Pat Prisco and I had many conversations.

Patty, on occasion, although he never asked me, "Well, how much is it today, how much is it tomorrow, you know, where's my balance," but he knew how hard the deductions were, the clips were.

As a matter of fact Patty, one day we were talking and he sad [sic], "Steve, I know exactly what you're doing, nobody could get the kind of adjustments on clean files, no inspections, that you and Tony worked out without me knowing that I'm giving it back to you someplace else," we had that conversation many times.

Tr. 2269-70.

I find that Respondent's evidence that these payments to Mr. Gentile were designed to adjust L&P's "clips" is not credible and does not rebut the evidence that Respondent's payments were intended to induce Mr. Gentile to buy tomatoes from Respondent.

E. Principals at L&P Were Unaware of Respondent's Payments.

Mr. Prisco, the president of L&P, testified that he did not know that Mr. Gentile received payments from Respondent based on the number of boxes of tomatoes that Mr. Gentile purchased from Respondent, as follows:

[BY MR. STANTON:]

[Q]. The Complainant, PACA, has made many allegations regarding the relationship between Tony Gentile and JSG and one of the allegations is that during that period, JSG was paying Tony Gentile a certain amount per box on boxes of tomatoes which JSG sold to L&P.

This is an allegation that's being made in this case. Are you aware that this allegation is being made?

[BY MR. PRISCO:]

A. Yes, I am.

Q. And, as evidence of this allegation, the PACA Complainant, has submitted into evidence in this proceeding numerous copies of JSG file jackets regarding sales to L&P, and I'd like you to turn to Complainant's Exhibit Number 8, page 1, 8(b), page 1.

Mr. Prisco, this document, as well as many others, has been submitted into evidence as a copy of a JSG file jacket reflecting sales to L&P during 1992 and early 1993.

Now, one of the things Complainant has alleged is that handwritten notations on the bottom corner were indications of payments per box regarding sales made to L&P by JSG that were actually going to Tony Gentile.

Now, assuming these allegations are true, were you ever aware that there were these notations on the file jacket, first of all?

A. First of all, the first time I saw them was a couple of months ago, so I couldn't possibly be aware of it.

Q. But certainly during 1992 and 1993 you weren't aware of them?

A. No, I would have no—you know, I wouldn't be able to see this.

Q. Assuming it's true and that these notations do indicate that payments were being made on these files per box basis to Tony Gentile, were you aware that such payments were made, if, in fact, it's true?

A. No.

Q. And I'm talking about during the time of the transactions during 1992 and 1993?

A. No.

. . . .

Q. Turn to Exhibit 13(b), page 1, do you see that? . . . .

A. Okay.

. . . .

BY MR. STANTON:

Q. It's been alleged that the notations in the area on the corner of that circle, indicate a certain payment to A. Gentile. If that's true, were you aware of that?

A. No.

Q. It's also been alleged that the payment to A. Gentile in this particular file, took place by means of reducing a debt that Tony Gentile owed to JSG and that allegedly is reflected by Exhibit 13(a), Page 3, which is the first document you were looking at.

A. Okay.

Q. If that is true, did you know about that?

A. No.

Q. Now, if any of your employees at L&P knew about that arrangement at the time, 1992 through 1993, would that have come to your attention?

A. Certainly.

Q. Did it come to your attention at all?

A. No.

. . . .

Q. Take a look at page one of 44(b).

A. I'm familiar with that check, $1,239.

Q. And it's been alleged that that check resulted from a per box payment reflected by the Tony, five cent notation on the file jacket that ultimately resulted in a $1,239 check to Gloria Gentile.

Now, the per box payment was on boxes of tomatoes sold by JSG to L&P. Now, if that were true, is that something that an arrangement that you would know about?

A. Is it something, I would know about?

Q. Right, or did know about?

A. It was something that I did not know—if it were true, I did not know about it.

Q. And, if anyone at L&P would have known about such arrangement, would they have informed you during 1992?

A. They certainly would have.

. . . .

Q. And, its been alleged and testified to by Ms. Colson, that everyone of these entries reflects a particular load of tomatoes sold by JSG to L&P, and it's also been alleged that the quantity involved in each of these loads, as listed in the fifth column from the left, is the basis for a five cents per box payment, which led to that check to Gloria Gentile.

Now, would you have been aware, assuming it's true; would you been [sic] aware of the existence of this Gloria and Tony Enterprises statement to JSG?

A. No.

Q. If anybody at L&P had been aware of it would they have brought it to you [sic] attention?

A. Yes.

Tr. 457-58, 462-64, 501-04.

In addition, Mr. Prisco signed a sworn statement in which he stated that G&T was not authorized to receive payments from L&P's produce suppliers and that he was not aware of

any payments to Mr. Gentile or G&T by L&P's produce suppliers, as follows:

> I Patrick Prisco, president of L&P Fruit Corp., state that:
>
> 1) Gloria and Tony Enterprises is a joint venture with L&P Fruit and as such has the authority to purchase tomatoes on behalf of L&P Fruit Corp.
>
> 2) Gloria and Tony Enterprises was not authorized to receive any compensation from L&P Fruit Corp.'s suppliers on behalf of L&P Fruit Corp.
>
> 3) Prior to March 25th 1993, I was unaware of any payments made to Mr. Gentile or Gloria and Tony Enterprises by any suppliers in connection with L&P Fruit Corp.[']s purchases. I am aware of payments made to Mr. Gentile or Gloria and Tony Enterprises by companies dealing with L&P Fruit Corp. that were unrelated to produce purchases.

CX-4.

I find that Complainant introduced substantial evidence to establish that the principals at L&P were not aware that Respondent made payments to Mr. and Mrs. Gentile and G&T. Mr. Goodman testified that Mr. Prisco generally knew of the "clips" (Tr. 2269-70, 2372). However, as discussed in this Decision and Order on Remand as to JSG Trading Corp., supra, Mr. Goodman's testimony regarding "clips" is not credible, and Respondent did not offer evidence to show that the principals at L&P were aware of each payment to Mr. and Mrs. Gentile and G&T. Respondent's evidence that the principals at L&P knew of the payments is not sufficient to rebut Complainant's evidence that the principals at L&P were not fully aware of Respondent's payments to Mr. and Mrs. Gentile and G&T.

II. Respondent's Payments to Mr. Lomoriello.

Mr. Lomoriello was employed as a purchasing agent by American Banana in December 1991 and left its employ in 1993 (Tr. 315). From December 1992 through February 1993, Respondent issued seven checks to Mr. Lomoriello totaling $9,733.45. I find that $9,733.45 is not *de minimis*.

Respondent and Mr. Lomoriello claim that these checks were not issued to induce Mr. Lomoriello to purchase tomatoes from Respondent, but rather were issued for Mr. Lomoriello's services not involving American Banana. However, the record does not reveal what specifically Mr. Lomoriello did for Mr. Goodman or Respondent to earn $9,733.45. Mr. Goodman testified that he began to ask Mr. Lomoriello to do things for him at the Hunts Point Market (Tr. 2192). However, Mr. Goodman admitted that there was never any written agreement setting forth what Mr. Lomoriello would do and the payments that he would receive (Tr. 2193).

Ms. Colson found 22 file jackets that relate to Respondent's sales of tomatoes to American Banana which contain notations that are similar to those on the backs of file jackets reflecting sales to L&P (CX 63-69; Tr. 550-51). The notations indicate that payments per box were being made to "Al," "HPT," or "Hunts Point Produce" in an amount equivalent to the amount of the notation multiplied by the number of boxes sold to American Banana. Ms. Colson found Hunts Point Produce Co. invoices in the file jackets for amounts corresponding to the payments to "Al," "HPT," or "Hunts Point Produce" listed on the file jackets. She also found seven of Respondent's checks totaling $9,733.45, made payable to Hunts Point Produce Co. (CX 63A at 1, CX 64A at 1, CX 65A at 1, CX 66A at 1, CX 67A at 1, CX 68A at 1, CX 69A at 4). The amounts on the Hunts Point Produce Co. invoices also correspond to the amounts of the checks made payable to Hunts Point Produce Co. and the Hunts Point

Produce Co. invoices contain Respondent's file numbers which correspond to the file numbers written on the checks payable to Hunts Point Produce Co. or written on the check skirts applicable to checks payable to Hunts Point Produce Co. (CX 63B at 3-4, CX 63C at 4-5, CX 64B at 3-4, CX 64C at 3-4, CX 65B at 4-5, CX 65C at 4-5, CX 65D at 4-5, CX 65E at 3-4, CX 65F at 3-4, CX 65G at 3-4, CX 66B at 4-5, CX 66C at 4-5, CX 66D at 3-4, CX 67B at 3-4, CX 67C at 3-4, CX 67D at 4-5, CX 68B at 6-7, CX 68C at 4-5, CX 68D at 4-5, CX 68E at 4-5, CX 69A at 4-5). Examination of these invoices reveals that only the earliest Hunts Point Produce Co. invoice, dated December 14, 1992, states how much money per box was being paid to Mr. Lomoriello (CX 63B at 4). When Ms. Colson examined Respondent's Closed File Journal, she found the amounts of the checks written by Respondent to Hunts Point Produce Co. listed in the "Open SC" column (CX 52; Tr. 604-05).

Ms. Levine testified that Mr. Goodman asked her to pay Mr. Lomoriello, although she did not know what services Mr. Lomoriello was rendering to Respondent (Tr. 1962). Ms. Levine said that she asked Mr. Lomoriello for some blank invoices that she could prepare to show that Mr. Lomoriello was not Respondent's employee (Tr. 1962, 1965). After she received the invoices and was told by Mr. Goodman what amounts to pay, Ms. Levine noted the payments to Mr. Lomoriello on American Banana files and completed a Hunts Point Produce Co. invoice to reflect the amounts to be paid to Mr. Lomoriello (Tr. 1968).

Although Ms. Levine claims that her actions were not done in furtherance of recording payments for buying tomatoes from Respondent, she stated that Mr. Lomoriello was quite upset when he received the December 14, 1992, invoice (CX 63B at 4), since it appeared to him as if he was receiving a "kickback." She testified:

> When Al received this, he was slightly upset and he told me I should never send him an invoice like this again because it looks like I'm getting a kickback. Those were his—actually he didn't say it as nicely as that, but I won't say what he said.

Tr. 1969.

Ms. Levine communicated Mr. Lomoriello's comments to Mr. Goodman (Tr. 2036). After being made aware that Mr. Lomoriello was upset that Respondent's payments to him were documented in a way that suggested that the payments were kickbacks, Respondent did not stop making payments to Mr. Lomoriello (Tr. 2037), but made the nature of the payments less obvious by not stating on the invoices how much per box each file was being charged (Tr. 2037).

Respondent and Mr. Lomoriello have not provided any credible evidence of what services Mr. Lomoriello performed for the money that he was paid by Respondent. Ms. Colson testified that in the course of her investigation, on March 11, 1993, when she asked to see Mr. Lomoriello's records, Mr. Lomoriello stated they were at his home and that he would provide them to her on the following day (Tr. 608-09). However, on the following day, when Ms. Colson met with Mr. Lomoriello, the only records that he produced were two deposit tickets (CX 70), supposedly reflecting his deposit of the funds received from Respondent (Tr. 630-31).

However, at the hearing, Mr. Lomoriello disclosed what he alleged were notes that he had written in 1992 and 1993 in response to Mr. Goodman's requests for his assistance (RL 19-25; Tr. 1179-81). These notes appear to be on paper containing an American Banana letterhead. Mr. Lomoriello explained: "RL—RL-20 is a piece of paper that Mimi Contos, American Banana has a pile of American Banana letterhead on the side of the copy machine that when you write notes to people it would be done on his letterhead. . . ." (Tr. 1180).

Mr. Lomoriello said that the notes were in the back of his file cabinet at his home, and he did not provide them to Ms. Colson in March 1993 because he did not find them until early 1995 (Tr. 1194-95, 1202). Upon cross-examination, Mr. Lomoriello stated that he obtained the American Banana stationery on which the notes were written (RL 19-25) from the desk of American Banana's bookkeeper, Carlos Valencia:

> [BY MR. STANTON:]
>
> Q. The documents—the blank documents on which you wrote the notes, RL-19 through RL-25, you obtained them from American Banana, right?
>
> [BY MR. LOMORIELLO:]
>
> A. The blank documents, that's American Banana stuff, yeah—yes.
>
> Q. Now, explain again where you—actually in American Banana you obtained them from?
>
> A. Carlos keeps them on his desk. You have to ask him, he gives you the papers and you—there are [sic] pretty tight in that office there so you got to ask for a pencil and he keeps everything locked up that he feels is worth any kind of money whatsoever and you got to ask for a piece of paper most of the time to do things.

Tr. 1196-97.

The question arose as to why American Banana's letterhead in RL 19-25 was completely different from American Banana's letterhead found on notes in Respondent's files (CX 65G at 7; CX 66B at 14). Mr. Lomoriello suggested that American Banana had stationery with different letterheads and stated that Carlos Valencia would know about American Banana stationery (Tr. 1225-28).

However, Mr. Valencia testified that the letterhead used for the alleged notes (RL 19-25) was identical to the letterhead

used for American Banana's invoices (e.g., RL 1) and the only letterhead that American Banana used for correspondence was the letterhead on notes found in Respondent's files (CX 65G at 7; CX 66B at 14).

BY MR. LOMORIELLO:

Q. The letterhead on RL-19 and the letterhead on CX 65(g), page 7, they are a little different aren't they, Mr. Valencia?

[BY MR. VALENCIA:]

A. Yes, very much, yes.

Q. But both of these letterheads—

JUDGE BERNSTEIN: Wait, wait. Is the letterhead in RL-19 an American Banana Company letterhead that's been used by American Banana?

THE WITNESS: No.

JUDGE BERNSTEIN: Have you ever seen that letterhead in RL-19 before?

THE WITNESS: Yes.

JUDGE BERNSTEIN: Can you explain about it?

THE WITNESS: I seen this on the invoice that we sent to the customers.

. . . .

JUDGE BERNSTEIN: And, you've seen that—let me see if I can understand your answer. That letterhead was used by American Banana, as I understand your answer?

THE WITNESS: It's been used on the statements that we send out to the customers. It is the headlines of the statements.

Tr. 1485-86.

When Mr. Lomoriello asked Mr. Valencia whether he kept a folder with photocopy paper containing American Banana's letterheads on his desk, as Mr. Lomoriello had testified earlier, Mr. Valencia vociferously denied that any paper with such letterheads were ever left outside his locked filing cabinet (Tr. 1490- 92).

Upon examining one of American Banana's invoices (RL 1) and Mr. Lomoriello's exhibits (RL 19-25), Mr. Valencia concluded that the purported American Banana letterhead could have been created by simply placing a piece of white paper over all but the letterhead of a typical American Banana invoice and copying the document in a copier (Tr. 1493-94). I conclude that is exactly what occurred—that Mr. Lomoriello manufactured this evidence to support his contention that the payments that he received from Respondent were not kickbacks.

Respondent also introduced into evidence other file jackets (RX 50 at 1-3 (SG 5206), RX 50 at 4-6 (SG 5176), RX 50 at 7-9 (SG 5175), RX 50 at 10-13 (SG 5298), RX 50 at 14-16 (SG 5304), RX 50 at 17-19 (SG 5476), RX 50 at 20-22 (SG 5480) and RX 50 at 23-25 (SG 5521)) which contain handwritten notations on the flaps allegedly referring to tasks performed by Mr. Lomoriello for Respondent in 1992 and 1993. However, I strongly suspect that the writings on the flaps of these file jackets were made after the transactions ended, as they appear in a different color ink than the other writings on the backs of the file jackets (Tr. 3006-34). Further, the reference to "Al" in (RX 50 at 18) (SG 5476) appears to be an attempt to write Mr. Lomoriello's name over an existing notation to make it appear as if Mr. Lomoriello was involved in the transaction (Tr. 3036). Considering the other evidence of falsification and alteration of documents, it is not unlikely that these file jacket flaps allegedly containing notes by Mr. Goodman involving Mr. Lomoriello were also altered in anticipation of the hearing. I, therefore, find this evidence to be unreliable.

Mr. Goodman and Mr. Lomoriello testified that the payments were for various services that Mr. Lomoriello performed for Respondent in other matters. Yet there was no reliable evidence that the payments to Mr. Lomoriello were charged to any other files associated with his alleged services. Given the meticulous nature of Mr. Goodman's notations of expenses on associated files, it is also unbelievable that these payments would be randomly charged to files totally unrelated to Mr. Lomoriello's alleged services. I, therefore, conclude that Respondent made these payments to Mr. Lomoriello totaling $9,733.45 to induce Mr. Lomoriello to purchase tomatoes from Respondent.

Mr. Contos, the vice-president of American Banana, testified that he did not know that Mr. Lomoriello received payments from Respondent based on the number of boxes of tomatoes that Mr. Lomoriello purchased from Respondent, as follows:

> [BY MR. STANTON:]
>
> Q. Now, Mr. Contos, assume for the sake of argument that Complainant's allegations are true and JSG was, in fact, paying Al Lomoriello or Hunts Point Produce a certain amount per box on boxes of tomatoes which JSG sold to American Banana.
>
> If we assume that these allegations are true, were you aware of this business arrangement?
>
> [BY MR. CONTOS:]
>
> A. No, sir.
>
> Q. Now, would you have been made aware of this type of business arrangement if anybody else at American Banana knew about it?
>
> A. No.
>
> Q. You wouldn't have been made aware—I mean, I'm not asking if you were made aware of it, but if

anybody else employed by American Banana knew about it, would they have told you?

A. Yes, but nobody told me anything about that, nobody knew, as far as I'm concerned, nobody mentioned to me that he was getting that money from JSG. I don't know.

Q. What's the name of the President of American Banana?

A. Alfred Allega.

Q. Alfred Allega, A-l-l-e-g-a?

A. He's my partner, yes, A-l-l-e-g-a, but he had nothing to do because we have two places, one is outside. We have three partners, I take care of Hunts Point Market inside the market and my other two partners, they take care of Fort Wayne and Hunts Point. I have two warehouses and I take this place, you know Hunts Point, and my partners got nothing to do with this.

In other words, it's the same company, but we run separately, you know, those two places. I'm running Hunts Point Market inside and they're running the other places.

Q. With regard to business dealings at Hunts Point that American Banana had with Al Lomoriello, who was—in your company, who was in charge of supervising that relationship?

A. I was.

Q. You were?

A. Yeah, like I told you before, I was taking care of Hunts Point and Al Lomoriello was with me. He had nothing to do with the other place outside the market, because like I explained to you, we have two places, one inside the market, Hunts Point and one outside.

. . . .

BY MR. LOMORIELLO:

. . . .

Q. Do you remember the day Ms. Colson came to American Banana, the lady sitting over there?

A. Yes.

Q. She came in, she asked to speak to you and you went to your office and closed the door and you spoke for a while with her?

A. Yes.

Q. Do you remember that?

A. Yes.

Q. Can you tell me what she told you that day, can you tell the Court what she told you that day?

A. She told me that she was looking for something and she was looking to see the records, that she wanted to know—

. . . .

THE WITNESS: Yes, she came over and she was looking for the papers to see how come he was getting commission from JSG and she wanted to know what's happening and I didn't know anything about that Mr. Lomoriello was getting commission from JSG, which I didn't know and she wanted to find out and I told her, I don't know.

Tr. 322-24, 415-16.

I find that Complainant introduced substantial evidence to establish that the principals at American Banana were not aware that Respondent made payments to Mr. Lomoriello. Respondent's evidence that the principals at American Banana knew of the payments is not sufficient to rebut Complainant's evidence that the principals at American Banana were not fully aware of Respondent's payments to Mr. Lomoriello.

III. *Quid Pro Quo* Agreement.

Respondent contends that *JSG Trading Corp. v. United States Dep't of Agric., supra*, makes clear that, in order to meet the traditional test for commercial bribery, Complainant must establish the existence of a specific *quid pro quo* agreement attached to the giving of the alleged consideration (Respondent's Motion to Dismiss at 4, 6; Respondent's Reply at 4).

However, I agree with Complainant's position (Complainant's Response at 16) that *JSG v. United States Dep't of Agric., supra*, does not require proof of the existence of a written or oral agreement between the parties alleged to have violated section 2(4) of the PACA, in order to meet the traditional test for commercial bribery. Instead, the Court indicates that the traditional test for commercial bribery typically contains only two elements, intent to induce and secrecy:

> It is clear that the test for commercial bribery employed by the agency in *Goodman* and *Tipco* requires a finding of both intent to induce and secrecy. These requirements are not surprising, given that commercial bribery statutes typically contain at least these two elements. *See, e.g.*, N.Y. PENAL LAW §§ 180.00, 180.03 (McKinney 1999) ("A person is guilty of commercial bribing . . . when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with the intent to influence his conduct in relation to his employer's or principal's affairs."); 720 ILL. COMP. STAT. ANN. 5/29A-1 (West 1998) ("A person commits commercial bribery when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's

affairs."); *see also* 2 Rudolph Callman, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 12.01, at 1 n.0.50; § 12.01, at 8-9 (4th ed. 1996 & Supp. 1999); BLACK'S LAW DICTIONARY 270 (6th ed. 1990) (defining commercial bribery as "[a] form of corrupt and unfair trade practice in which an employee accepts a gratuity to act against the best interests of his employer").

. . . .

Even assuming that Mr. Goodman's gifts to Mr. Gentile were made not out of pure friendship, but rather in an effort to curry favor with Mr. Gentile, it is not immediately obvious how the marketplace is disturbed—or how Mr. Goodman is violating any implied duty under the PACA—if Mr. Gentile's employer is aware of the gifts, and there is no specific *quid pro quo* agreement between Mr. Goodman and Mr. Gentile. . . . In other words, without a finding of secrecy and intent to induce, there appears to be nothing to distinguish an illegal bribe from a simple promotional gift.

JSG Trading Corp. v. United States Dep't of Agric., supra, 176 F.3d at 542-43, 545.

Thus, I do not find that proof of a specific written or oral agreement between Respondent and Mr. Gentile or Respondent and Mr. Lomoriello is prerequisite to my finding that Respondent violated section 2(4) of the PACA.

Even if I found that the elements of traditional commercial bribery, as described in *JSG Trading Corp. v. United States Dep't of Agric., supra*, include the existence of a *quid pro quo* agreement, I would find that Respondent engaged in activity that meets the traditional test for commercial bribery. Complainant did not introduce evidence of a specific written or oral agreement between Respondent and Mr. Gentile or between Respondent and Mr. Lomoriello, in which the parties

agreed that, in exchange for payments from Respondent, Mr. Gentile and/or Mr. Lomoriello would purchase tomatoes from Respondent rather than Respondent's competitors. However, Complainant introduced substantial evidence that Respondent made a series of payments to Messrs. Gentile and Lomoriello to induce Messrs. Gentile and Lomoriello to purchase tomatoes from Respondent and substantial evidence that the principals at L&P were not aware of all of Respondent's payments to Mr. Gentile and the principals at American Banana were not aware of Respondent's payments to Mr. Lomoriello. Moreover, Complainant introduced substantial evidence that many of these payments were directly dependent on the number of boxes of tomatoes that Messrs. Gentile and Lomoriello purchased from Respondent. Based on these facts, I infer that Respondent and Mr. Gentile and Respondent and Mr. Lomoriello had *quid pro quo* agreements in which, in exchange for Respondent's payments, Messrs. Gentile and Lomoriello agreed to purchase tomatoes from Respondent.

IV. Collateral Fees and Expenses.

Respondent contends that *JSG Trading Corp. v. United States Dep't of Agric., supra,* requires that I consider Respondent's payments to Messrs. Gentile and Lomoriello in light of the PACAA-1995, which allows the good faith offer, solicitation, payment, or receipt of collateral fees and expenses. Respondent asserts that there is nothing in the record that demonstrates that Respondent's payments were other than collateral fees and expenses made in good faith. (Respondent's Motion to Dismiss at 12.)

I disagree with Respondent's contention that *JSG Trading Corp. v. United States Dep't of Agric., supra,* requires me to consider whether Respondent's payments to Messrs. Gentile and Lomoriello were good faith collateral fees and expenses paid in accordance with the PACA.

The Court states that "[s]everal of the gifts given to Mr. Gentile by Mr. Goodman arguably could be considered 'promotional allowances' made in good faith (*i.e.*, not in secret), and in connection with the marketing of JSG's product." The Court instructed that, "[o]n remand, the agency must explain its justification, if it has one, for employing a *per se* test for commercial bribery, and it must do so in conjunction with the 1995 amendment to PACA. The agency is free, of course, to abandon the *per se* approach, and apply the traditional commercial bribery test employed in *Goodman* and *Tipco*." *JSG Trading Corp. v. United States Dep't of Agric., supra*, 176 F.3d at 546.

Since I abandon the *per se* test for commercial bribery, the Court's instruction that I explain the justification for the *per se* test for commercial bribery, in conjunction with the provision of the PACAA-1995 that allows the good faith payment of collateral fees and expenses, does not apply to this Decision and Order on Remand as to JSG Trading Corp. Moreover, as fully explicated in this Decision and Order on Remand as to JSG Trading Corp., *supra*, I find Respondent made payments to induce Messrs. Gentile and Lomoriello to purchase tomatoes from Respondent and that the principals at L&P were not fully aware of all of Respondent's payments to Mr. Gentile and the principals at American Banana were not fully aware of Respondent's payments to Mr. Lomoriello (*i.e.*, Respondent's payments were not "made in good faith" and therefore could not have been good faith payments of collateral fees and expenses allowed under the PACAA-1995).

V. Messrs. Gentile and Lomoriello Were Not Partners or Independent Brokers.

Respondent contends that Messrs. Gentile and Lomoriello were partners in limited joint venture arrangements with L&P and American Banana, respectively. Respondent contends that, as a matter of law, Respondent's payments to Messrs.

Gentile and Lomoriello could not constitute an activity that falls within the traditional definitions of commercial bribery because knowledge of payment to one partner must be attributed to the other partners and such payments could not be considered secret. Alternatively, Respondent asserts that Messrs. Gentile and Lomoriello were independent brokers and that payments to independent brokers are permissible under the PACA. (Respondent's Reply at 15-19.)

Starting in approximately 1985, and continuing until approximately 1991, Mr. Gentile was the head salesman, managed the sales operation, and was the tomato buyer at L&P (Tr. 442). Mr. Gentile had a joint account arrangement with L&P, in accordance with which Mr. Gentile shared profits and losses with L&P on the tomatoes that he purchased (Tr. 445). Mr. Gentile became ill in late 1990 or early 1991 and from that time through the date of the hearing, Mr. Gentile continued to purchase tomatoes for L&P from his home (Tr. 446, 2909). L&P continued to compensate Mr. Gentile on a joint account basis, but at a reduced rate of 15 per centum of the profits and losses (Tr. 447).

Mr. Gentile described himself as beingemployed by L&P (Tr. 2819). Mr. Prisco, the president of L&P, described Mr. Gentile as an employee of L&P and stated that L&P uses joint account arrangements with salespersons because the joint account arrangement gives a salesperson an incentive to work hard (Tr. 442-47). Mr. Beni, the secretary-treasurer of L&P, testified that Mr. Gentile was a salesperson for L&P and that L&P paid Mr. Gentile a salary for his fruit sales and had a joint account arrangement with Mr. Gentile with respect to his tomato sales (Tr. 2890, 2892-93). Mr. Beni testified that joint account arrangements are used because they give people "an incentive to sell more stuff" (Tr. 2893). Mr. Beni testified that his partner at L&P was in charge of the office, and when asked who his partner was, Mr. Beni identified his partner as Mr. Prisco (Tr. 2890-91).

Mr. Lomoriello became employed by American Banana in approximately December 1991 (Tr. 1256). Mr. Lomoriello had a joint account arrangement with American Banana in accordance with which Mr. Lomoriello shared profits and losses with American Banana on the produce that he purchased (Tr. 1245-46).

Mr. Contos, American Banana's vice-president, described Mr. Lomoriello as working for American Banana as a night salesperson and described himself as supervising Mr. Lomoriello (Tr. 314, 323). While Mr. Lomoriello characterized himself as an independent contractor, who sold services to American Banana (Tr. 1244), and a partner (Tr. 1277-78), he also described his duties at American Banana, which description supports Mr. Contos' view that Mr. Lomoriello was a salesperson working for American Banana (Tr. 1258-66). Mr. Contos testified that the president of American Banana was Alfred Allega and testified that he (Mr. Contos) had two partners. Mr. Contos identified Mr. Allega as one of those partners, but did not identify the other partner. (Tr. 323-24.)

A partnership is an association of two or more persons to carry on business for a profit.[9] An essential element of partnership is sharing of profit and losses[10] and sharing of profits and losses generally constitutes prima face evidence of the existence of a partnership.[11] However, the fact that an

---

[9] *Bickhardt v. Ratner*, 871 F. Supp. 613, 620 (S.D.N.Y. 1994).

[10] *ACLI Government Securities, Inc. v. Rhoades*, 813 F. Supp. 255, 257 (S.D.N.Y.), *aff'd*, 14 F.3d 591 (2d Cir. 1993); *Steinbeck v. Gerosa*, 175 N.Y.S.2d 1, 13 (N.Y.), *appeal dismissed*, 358 U.S. 39 (1958); *Scharf v. Crosby*, 502 N.Y.S.2d 891, 892 (N.Y. App. Div. 1986) (mem.); *Missan v. Schoenfeld*, 465 N.Y.S.2d 706, 711-12 (N.Y. App. Div. 1983); *Bennett v. Pierce Industries, Inc.*, 281 N.Y.S.2d 674, 676 (N.Y. App. Div. 1967) (per curiam); *Reynolds v. Searle*, 174 N.Y.S. 137, 138 (N.Y. App. Div. 1919).

[11] *Kellogg v. Kellogg*, 564 N.Y.S.2d 631, 633 (N.Y. App. Div. 1991); *Missan v. Schoenfeld*, 465 N.Y.S.2d 706, 712 (N.Y. App. Div. 1983).

individual shares profits and losses is not dispositive of partnership status[12] and whether partnership status exists turns on several factors, including the intention of the parties that they be partners, sharing in profits and losses, exercising joint control over the business, making capital investment, and possessing an ownership interest in the partnership.[13]

The party alleging the existence of a partnership bears the burden of proof on the issue.[14] The record does not support a finding that Mr. Gentile was a partner with L&P or the principals at L&P or a finding that Mr. Lomoriello was a partner with American Banana or the principals at American Banana. Instead, the record establishes that the joint account arrangements that Messrs. Gentile and Lomoriello had with

---

[12] *Martin v. Peyton*, 246 N.Y. 213, 128 (N.Y. 1927); *Kellogg v. Kellogg*, 564 N.Y.S.2d 631, 633 (N.Y. App. Div. 1991); *Blaustein v. Lazar Borck & Mensch*, 555 N.Y.S.2d 776, 777 (N.Y. App. Div. 1990) (mem.); *Boyarsky v. Froccaro*, 516 N.Y.S.2d 775, 777 (N.Y. App. Div. 1987) (mem); *Missan v. Schoenfeld*, 465 N.Y.S.2d 706, 712 (N.Y. App. Div. 1983); *Ramirez v. Goldberg*, 439 N.Y.S.2d 959, 961 (N.Y. App. Div. 1981); *Barschi v. Euben*, 426 N.Y.S.2d 802 (N.Y. App. Div.) (mem.), *appeal denied*, 433 N.Y.S.2d 1027 (N.Y. 1980).

[13] *Bickhardt v. Ratner*, 871 F. Supp. 613, 620 (S.D.N.Y. 1994); *ACLI Government Securities, Inc. v. Rhoades*, 813 F. Supp. 255, 256 (S.D.N.Y.), *aff'd*, 14 F.3d 591 (2d Cir. 1993); *Televideo Systems, Inc. v. Mayer*, 139 F.R.D. 42, 48 (S.D.N.Y. 1991) (mem.); *Kyle v. Brenton*, 584 N.Y.S.2d 698, 699 (N.Y. App. Div. 1992) (mem.); *Blaustein v. Lazar Borck & Mensch*, 555 N.Y.S.2d 776, 777 (N.Y. App. Div. 1990) (mem.); *Farmer v. State Tax Commission of New York*, 535 N.Y.S.2d 453, 455-56 (N.Y. App. Div. 1988); *Brodsky v. Stadlen*, 526 N.Y.S.2d 478, 479 (N.Y. App. Div. 1988) (mem.); *Alleva v. Alleva Dairy*, 514 N.Y.S.2d 422, 423 (N.Y. App. Div. 1987); *M.I.F. Securities Co. v. R.C. Stamm & Co.*, 463 N.Y.S.2d 771, 774 (N.Y. App. Div.), *aff'd*, 471 N.Y.S.2d 84 (1983).

[14] *Televideo Systems, Inc. v. Mayer*, 139 F.R.D. 42, 48 (S.D.N.Y. 1991) (mem.); *Blaustein v. Lazar Borck & Mensch*, 555 N.Y.S.2d 776, 777 (N.Y. App. Div. 1990) (mem.); *Ramirez v. Goldberg*, 439 N.Y.S.2d 959, 961 (N.Y. App. Div. 1981); *Moscatelli v. Nordstrom*, 337 N.Y.S.2d 575, 576 (N.Y. App. Div. 1972) (mem).

L&P and American Banana, respectively, were merely methods by which L&P and American Banana compensated Messrs. Gentile and Lomoriello, respectively, for services. I find that Mr. Gentile was a purchasing agent working for a principal, L&P, and that Mr. Lomoriello was a purchasing agent working for a principal, American Banana.

Conclusion of Law

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA.

For the foregoing reasons, the following Order should be issued.

Order

JSG Trading Corp.'s PACA license is revoked, effective 61 days after service of this Order on JSG Trading Corp.

APPENDIX C

[Filed Mar 22, 2001]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No.00-1011

JSG TRADING CORP.,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE and
United States of America,

Respondents.

BEFORE: Sentelle, Randolph and Rogers, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing filed February 20, 2001, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER, Clerk

By /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX D

[Filed Mar. 22, 2001]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No.00-1011

JSG TRADING CORP.,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE and
United States of America,

Respondents.

BEFORE: Edwards, Chief Judge Williams, Ginsburg, Sentelle, Henderson, Randolph, Rodgers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER, Clerk

By /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Tatel did not participate in this matter.

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
SEP 19 2001
OFFICE OF THE CLERK

No. 01-123

In the Supreme Court of the United States

JSG TRADING CORPORATION, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
STUART E. SCHIFFER
Acting Assistant Attorney General
ROBERT S. GREENSPAN
MICHAEL E. ROBINSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 2(4) of the Perishable Agricultural Commodities Act, 1930, 7 U.S.C. 499b(4), makes it unlawful for "any commission merchant, dealer, or broker * * * to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such [produce] transaction." The question presented in this case is as follows:

Whether a produce seller that offers consideration to a buyer's agent or employee, without the knowledge of the principal or employer, and with intent to induce purchase of the seller's product, breaches a duty under Section 2(4) not to corrupt the buyer's agents and employees.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Flanagan & Jones, Inc. v. *World Wide Consultants, Inc.*, 53 Agric. Dec. 828 (1994)	12
Rich-Seapak Corp. v. *Pro-Ag, Inc.*, 56 Agric. Dec. 1958 (1997)	12
Salinas Lettuce Farmers Coop., In re, 50 Agric. Dec. 984 (1991)	12
Sid Goodman & Co., In re, 49 Agric. Dec. 1169 (1990), aff'd, 945 F.2d 398 (4th Cir. 1991), cert. denied, 503 U.S. 970 (1992)	3, 7-8
Tipco, Inc., In re, 50 Agric. Dec. 871 (1991), aff'd, 953 F.2d 639 (4th Cir.), cert. denied, 506 U.S. 826 (1992)	3, 8
United States v. *Sun-Diamond Growers*, 526 U.S. 398 (1999)	10, 11

Statutes and regulations:

Perishable Agricultural Commodities Act, 1930, 7 U.S.C. 499a *et seq.*:	
§ 2, 7 U.S.C. 499b	2
§ 2(4), 7 U.S.C. 499b(4)	2, 3, 4, 6, 11, 12
§ 3, 7 U.S.C. 499c	2
§ 8(a), 7 U.S.C. 499h(a)	2
18 U.S.C. 201(c)(1)(A)	10, 11
7 C.F.R.:	
Section 1.132	4
Section 2.35	4

Regulation—Continued: Page

Section 46.26 3

Miscellaneous:

S. Rep. No. 2507, 84th Cong., 2d Sess. (1956) 2

In the Supreme Court of the United States

No. 01-123

JSG TRADING CORPORATION, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 235 F.3d 608. The opinion of the Judicial Officer of the United States Department of Agriculture (Pet. App. 16a-82a) is reported at 58 Agric. Dec. 1041. A prior opinion of the court of appeals is reported at 176 F.3d 536. A prior opinion of the Judicial Officer is reported at 57 Agric. Dec. 640. The opinion of the administrative law judge is reported at 56 Agric. Dec. 1800.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2001. A petition for rehearing was denied on March 22, 2001 (Pet. App. 83a). On May 21, 2001, the Chief Justice granted an extension of time within which

to file a petition for a writ of certiorari to and including July 20, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Perishable Agricultural Commodities Act (PACA) was enacted in 1930 "for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous." S. Rep. No. 2507, 84th Cong., 2d Sess. 3 (1956). The PACA requires all buyers and sellers of large quantities of perishable goods to have a license issued by the Secretary of Agriculture. See 7 U.S.C. 499c.

Section 2 of the PACA prohibits certain trade practices deemed unfair or deceptive. See 7 U.S.C. 499b. If the Secretary of Agriculture finds that a merchant, dealer, or broker has violated one of the provisions of Section 2, the Secretary may suspend the offender's license or, if the violation is "flagrant or repeated," revoke the license. See 7 U.S.C. 499h(a).

In pertinent part, Section 2(4) provides:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> * * *
>
> (4) [f]or any commission merchant, dealer, or broker * * * to fail, without reasonable cause, to perform any specification or duty, express or

> implied, arising out of any undertaking in connection with any such transaction.

7 U.S.C. 499b(4); see also 7 C.F.R. 46.26. As a result of an amendment enacted in 1995, Section 2(4) further provides: "However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter."

The United States Department of Agriculture (USDA) has interpreted Section 2(4) to prohibit a seller of agricultural goods from corrupting the agent of a buyer. The USDA considers that duty to have been breached "when a seller offers consideration to a buyer's agent or employee, without the knowledge of the principal or employer, with intent to induce purchase of the seller's product." Pet. App. 2a. The USDA has characterized such conduct as "commercial bribery." *Ibid.*; see *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1182-1189 (1990), aff'd, 945 F.2d 398 (4th Cir. 1991) (Table), cert. denied, 503 U.S. 970 (1992); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 882-887 (1991), aff'd, 953 F.2d 639 (4th Cir.) (Table), cert. denied, 506 U.S. 826 (1992).

2. Petitioner JSG Trading Corporation is a New Jersey corporation, licensed under the PACA since 1988, that was engaged in the business of buying and selling produce. The charges in this case arose from petitioner's relationship with agents of two tomato purchasers, L&P Fruit Corporation (L&P) and American Banana Co., Inc. (American Banana). Anthony and Gloria Gentile were purchasing agents for L&P; Albert Lomoriello was a purchasing agent for American Banana. In January 1993, the USDA commenced an investigation that led to the filing of a complaint against

petitioner, the Gentiles, and Mr. Lomoriello. The complaint alleged that petitioner had made unlawful payments to the Gentiles and Mr. Lomoriello to induce them to purchase tomatoes from petitioner, in violation of Section 2(4) of the PACA. Pet. App. 3a.

After a hearing, an administrative law judge (ALJ) found that petitioner had engaged in seven transactions with the Gentiles and Mr. Lomoriello that constituted "commercial bribery" and therefore violated Section 2(4). 56 Agric. Dec. 1800, 1813 (1997). The ALJ found that petitioner had (1) sold a boat to Mr. Gentile for a fraction of its value; (2) paid in part for the lease of a Mercedes for Mr. Gentile; (3) given Mr. Gentile a $3000 Rolex watch; (4) overpaid Mrs. Gentile by at least $33,000 on the purchase of shares of JSG stock and paid $5600 to G&T Enterprises (G&T), a corporation controlled by Mrs. Gentile; (5) issued 35 checks to Mr. Gentile totalling $62,535.60; (6) made several unjustified payments to Mrs. Gentile; and (7) issued seven unjustified checks to Mr. Lomoriello totaling $9733.45. See *id.* at 1816-1822, 1831-1832; see also Pet. App. 3a-5a. Finally, the ALJ determined that the violations were flagrant and repeated, and it ordered that petitioner's license be revoked. 56 Agric. Dec. at 1837.

Petitioner appealed to the Judicial Officer of the USDA, who is the final deciding officer in the USDA's administrative process. See 7 C.F.R. 1.132, 2.35. The Judicial Officer adopted, with minor changes, the decision of the ALJ. 57 Agric. Dec. 640 (1998).

3. The United States Court of Appeals for the District of Columbia Circuit granted petitioner's petition for review and remanded the case to the USDA for further proceedings. *JSG Trading Corp.* v. *USDA*, 176 F.3d 536 (1999) (*JSG I*). The court explained that the Judicial Officer had "applied a *per se* test, which deems

illegal any payment above a *de minimis* level from a produce dealer to a purchasing agent, regardless of whether there is any secrecy or intent to induce." *Id.* at 543. The court found that the Judicial Officer had thereby deviated without explanation from the standard used in prior agency decisions to determine whether particular payments constitute "commercial bribery." Those decisions had required a showing that a payment was made with the intent to induce the agent to make a purchase, and that the payment was made without the knowledge of the agent's principal. *Id.* at 543-544. The court remanded the case to the agency either to apply the traditional standard or to explain its justification for applying a new standard. *Id.* at 544-546.

4. On remand, the Judicial Officer applied the agency's traditional standard for commercial bribery, which he described as requiring

> [p]roof that: (1) a commission merchant, dealer, or broker made a payment to or offered to pay a purchasing agent; (2) the value of the payment or offer was more than *de minimis*; (3) the payment or offer was intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; and (4) the purchasing agent's principal or employer was not fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent.

Pet. App. 28a. The Judicial Officer found that three of the payments to Mr. Gentile—the lease of the Mercedes, the sale of the boat for less than its value, and the gift of the Rolex watch—were not violations of the PACA because they were not intended to induce Mr.

Gentile to purchase from petitioner. *Id.* at 43a. The Judicial Officer concluded, however, that the 35 checks to Mr. Gentile, the payments to Mrs. Gentile and to G&T, the stock purchase from Mrs. Gentile, and the checks to Mr. Lomoriello were all acts of "commercial bribery." See *id.* at 43a-82a. The Judicial Officer again found that the violations of Section 2(4) were repeated and flagrant, and he ordered that petitioner's license be revoked. *Id.* at 82a.

5. The court of appeals denied petitioner's petition for review. Pet. App. 1a-15a. The court held that the Judicial Officer's decision was supported by substantial evidence and that the Judicial Officer had reasonable grounds for rejecting petitioner's proffered explanations for most of the payments in question. *Id.* at 3a-5a.[1] The court further held that the legal standard applied by the Judicial Officer on remand was consistent both with agency precedent and with the court's opinion on the prior petition for review. *Id.* at 5a-11a. The court explained in particular that neither the USDA's prior decisions nor the court's earlier opinion "require[d] a *quid pro quo* arrangement between the payer and the payee." *Id.* at 9a; see *id.* at 9a-11a. The court stated that "[t]he federal cases requiring a *quid pro quo* that [petitioner] cites do not persuade us otherwise, for they interpret federal criminal bribery statutes containing entirely different language than PACA." *Id.* at 10a. The court held that while a *quid*

[1] The court of appeals did express doubt as to whether the $5600 check to G&T was an instance of commercial bribery. Pet. App. 5a. The court stated, however, that it "[could] not see how the $5,600 payment could affect the outcome of this case. The remaining payments to Mr. and Mrs. Gentile and Mr. Lomoriello amply support revocation of [petitioner's] PACA license." *Ibid.*

pro quo requirement would be an acceptable means of distinguishing between bribes and legitimate transactions, the secrecy and intent elements of the traditional test adequately served the same purpose. *Id.* at 10a-11a. The court also stated, however, that it "agree[d]" with the Judicial Officer's finding "that [petitioner's] per-box payment scheme constituted a *quid pro quo*." *Id.* at 9a n.7.

The court of appeals observed as well that "[t]he essence of the commercial bribery offense * * * is the corruption or attempted corruption by the produce seller of its buyer's agent or employee. So framed, it does not cover payments made to an employer or principal." Pet. App. 11a-12a. The court therefore acknowledged that "[i]f Mr. Gentile and Mr. Lomoriello were principals in L&P and American Banana, then [petitioner] did not commit commercial bribery." *Id.* at 12a. The court "agree[d] with the Judicial Officer," however, that Mr. Gentile and Mr. Lomoriello were purchasing agents rather than principals. *Ibid.* Finally, the court of appeals held that the USDA's revocation of petitioner's license was a permissible sanction for petitioner's flagrant and repeated violations. *Id.* at 14a-15a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. In sustaining the revocation of petitioner's license in this case, the court of appeals did not sanction any departure from prior USDA precedent. When petitioner filed its first petition for review, the court remanded the case to the Judicial Officer with directions either to apply the standards articulated in *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), aff'd, 945

F.2d 398 (4th Cir. 1991) (Table), cert. denied, 503 U.S. 970 (1992), and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), aff'd, 953 F.2d 639 (4th Cir.) (Table), cert. denied, 506 U.S. 826 (1992), or to explain his reasons for employing different standards. See *JSG I*, 176 F.3d at 546. Under *Goodman* and *Tipco*, liability for "commercial bribery" requires proof that a payment or offer of payment was made to induce a purchasing agent to buy from the dealer, and that the payment was made without the knowledge of the purchasing agent's principal. *Goodman*, 49 Agric. Dec. at 1187; *Tipco*, 50 Agric. Dec. at 896, 899; see also Pet. App. 28a; *JSG I*, 176 F.3d at 542.

The Judicial Officer on remand articulated and applied the USDA's traditional standard for "commercial bribery" in a manner fully consistent with the relevant agency precedents. On the most recent petition for review, the court of appeals considered petitioner's contrary arguments and concluded that the test employed by the Judicial Officer on remand "is consistent with *Goodman* and *Tipco*." Pet. App. 7a. Because the court of appeals concluded that the agency adjudicator faithfully applied established legal rules, there is no basis for petitioner's prediction (Pet. 18-23) that the court's decision will cause disruption of agricultural markets or interference with established business practices.[2]

---

[2] There is, in particular, no basis for petitioner's assumption (see Pet. 21) that under the court of appeals' opinion a produce customer must be informed of collateral fees and payments *before* the purchasing agent accepts them on the customer's behalf. To the contrary, the court's opinion reflects its understanding that the agency's conception of commercial bribery "does not cover payments made to an employer or a principal" because "payments made to the produce buyer itself, as opposed to its agents or

2. Petitioner argues (Pet. 15-23) that the court of appeals' decision "eviscerates" the 1995 amendments to the PACA, which allow certain good faith payments of collateral fees and expenses. That claim lacks merit.

In granting petitioner's earlier petition for review and remanding the case for further consideration by the agency, the court of appeals expressed concern that the *per se* test employed in the Judicial Officer's initial opinion in this case might be inconsistent with the 1995 amendments to the PACA. See *JSG I*, 176 F.3d at 546. The court noted that the test articulated in the Secretary's prior decisions had included two elements—intent to induce agents to buy from the payer, and failure to inform the purchasing agent's principal of the transactions—that helped separate improper bribes from legitimate transactions. See *id.* at 542. In denying the most recent petition for review, the court emphasized that "[t]he secrecy element in particular also distinguishes the transactions at issue from a category of promotional activities recognized as legitimate by" the 1995 amendments. Pet. App. 11a. The court explained that "[p]romotional allowances, rebates, and the like are typically given with the buyer's knowledge rather than secretly directed to the buyer's agents or employees," and that the payments at issue here "also lack the requisite good faith," since "[n]o reasonable conception of honesty or fair dealing includes secret payments designed to corrupt a produce buyer's agents or employees." *Ibid.*

---

employees, do not possess the requisite secrecy." Pet. App. 11a-12a. Payments made to the customer itself would not be covered by the *Goodman/Tipco* rule, even if the agent consummates the transaction before those payments are brought to the principal's attention.

Petitioner contends (Pet. 16-17) that "there is no basis in PACA or its regulations to conclude that the employer's awareness has any relevance as to whether a particular payment is a collateral fee or expense." The more salient point, however, is that promotional allowances and rebates are typically given to the customer (though they may be accepted on the customer's behalf by its agent) rather than being directed to the agent for his personal use. In any event, the court of appeals correctly sustained the Judicial Officer's determination (see Pet. App. 78a) that the payments in question lacked the requisite "good faith." Petitioner is doubtless correct that "[e]fforts to induce someone to buy from one's own company, as opposed to one's competitors, cannot be said to be *per se* corrupt or in bad faith." Pet. 18. The typical method of "induc[ing] someone to buy from one's own company," however, is to offer incentives that make a transaction more favorable or attractive *to the customer*. Petitioner, by contrast, sought to achieve that objective by funneling surreptitious payments to agents who owed a duty of loyalty to the buyers. Petitioner offers no basis for believing that those payments comported with accepted standards of good faith business conduct, or that Congress intended the 1995 PACA amendments to legitimate such practices.

3. Petitioner contends (Pet. 23-26) that the court of appeals' decision in this case conflicts with this Court's holding in *United States* v. *Sun-Diamond Growers*, 526 U.S. 398 (1999). *Sun-Diamond* presented a question concerning the construction of 18 U.S.C. 201(c)(1)(A), which makes it a federal crime to give anything of value to a public official "for or because of any official act." See 526 U.S. at 401. This Court interpreted Section 201(c)(1)(A) to require the government to "prove a link

between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *Id.* at 414. Petitioner contends that the concept of "commercial bribery" developed by the USDA pursuant to the PACA must similarly be limited to payments linked to specific agricultural transactions. Petitioner's reliance on *Sun-Diamond* is misplaced.

As the court of appeals explained, *Sun-Diamond* is inapposite here because it interprets a federal criminal statute "containing entirely different language than PACA." Pet. App. 10a; see also *JSG I*, 176 F.3d at 545 (recognizing that "[g]iven the broad language of § 2(4) [of the PACA], the agency is not necessarily bound by traditional statutory definitions of commercial bribery"). The pertinent PACA provision makes it unlawful "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction [in interstate or foreign commerce]." 7 U.S.C. 499b(4). That language, which covers the breach of any duty "arising out of any undertaking in connection with any" covered transaction, is significantly broader than the provision at issue in *Sun-Diamond*. Moreover, although the Court in *Sun-Diamond* characterized its interpretation of Section 201(c)(1)(A) as the "more natural reading" of the statutory language, 526 U.S. at 412, it did not hold that the text of the relevant provision *compelled* that reading. Construction of the relevant PACA provision, unlike the interpretation of a federal criminal prohibition, is primarily entrusted to the USDA rather than the courts. As the court of appeals recognized, judicial review in this context "is limited to ensuring that the Department's construction of PACA is reasonable and that the Department either follows its prior constructions of the statute or

articulates a reasoned justification for departing." Pet. App. 10a n.8.[3]

The instant case is in any event an unsuitable vehicle for resolving the question whether Section 499b(4) requires proof of a *quid pro quo* as an element of "commercial bribery." The Judicial Officer explained that "[e]ven if I found that the elements of traditional commercial bribery * * * include the existence of a *quid pro quo* agreement, I would find that [petitioner] engaged in activity that meets the traditional test for commercial bribery." Pet. App. 76a. The Judicial

---

[3] Petitioner is also wrong in suggesting (Pet. 26-27) that the Judicial Officer departed from a prior agency practice of defining the duties owed under 7 U.S.C. 499b(4) by reference to state law. The agency decisions on which petitioner relies simply make clear that the USDA will look to existing bodies of law, including state law, in resolving questions of contract interpretation that arise in matters committed to the agency's jurisdiction. See *Rich-Seapak Corp.* v. *Pro-Ag, Inc.*, 56 Agric. Dec. 1958, 1965-1966 (1997) (looking to the Uniform Commercial Code (UCC) for guidance on construing a supply contract); *Flanagan & Jones, Inc.* v. *World Wide Consultants, Inc.*, 53 Agric. Dec. 828, 858 n.22 (1994) (applying the UCC's method for measuring damages); *In re Salinas Lettuce Farmers Coop.*, 50 Agric. Dec. 984, 989 n.8 (1991) (using the UCC's definition of "commercial unit"). Those cases do not, however, establish any overarching principle that questions arising under Section 499b(4) must always be resolved by reference to state law. And petitioner does not contend that the agency has previously defined the scope of "commercial bribery" by borrowing the law of a particular State. To the contrary, the traditional elements of "commercial bribery" in this context, as described by the court of appeals both in *JSG I* and on the most recent petition for review, do not involve an inquiry into the law of any particular State. See 176 F.3d at 542 ("It is clear that the test for commercial bribery employed by the agency in *Goodman* and *Tipco* requires a finding of both intent to induce and secrecy."); Pet. App. 5a (referring to "*Goodman's* and *Tipco's* intent-to-induce and secrecy standard").

Officer found "substantial evidence that many of these payments were directly dependent on the number of boxes of tomatoes that Messrs. Gentile and Lomoriello purchased from [petitioner]," and he inferred from that fact that "[petitioner] and Mr. Gentile and [petitioner] and Mr. Lomoriello had *quid pro quo* agreements in which, in exchange for [petitioner's] payments, Messrs. Gentile and Lomoriello agreed to purchase tomatoes from [petitioner]." *Id.* at 77a. The court of appeals "agree[d] that [petitioner's] per-box payment scheme constituted a *quid pro quo*," while noting that its "decision does not turn on this fact." *Id.* at 9a n.7. There is consequently no reason to believe that either the Judicial Officer or the court of appeals would have resolved this case differently if a *quid pro quo* requirement were incorporated into the test for determining whether particular payments constitute proscribed "commercial bribery."

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
ROBERT S. GREENSPAN
MICHAEL E. ROBINSON
Attorneys

SEPTEMBER 2001

(3)

Supreme Court, U.S.
FILED
SEP 19 2001
CLERK

No. 01-123

IN THE

Supreme Court of the United States

JSG TRADING CORPORATION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FOOD DISTRIBUTORS INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

ALLEN I. HIRSCH *
HENRY M. PERLOWSKI
MICHAELEEN EARLE CROWELL
ARNALL GOLDEN GREGORY LLP
2800 One Atlantic Center
1201 W. Peachtree Street, N.E.
Atlanta, GA 30309-1450
(404) 873-8500

* Counsel of Record

Counsel for Amicus Curiae

September 19, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

25 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	7
REASONS FOR GRANTING THE PETITION	9
I. THE DECISION BELOW, WHICH FLATLY CONTRADICTS THE PLAIN LANGUAGE OF PACA AND THE REGULATIONS THEREUNDER, THREATENS TO MATERIALLY DISRUPT THE PERISHABLE AGRICULTURAL COMMODITIES INDUSTRY	9
A. The Plain Language Of PACA And The Regulations Authorizing Collateral Fees Define the Industry's Reasonable Expectations	9
B. Violations Of Section 2(4) Require A Nexus To Specific Transactions And Cannot Be Predicated On The General Intent To Foster Business Interests	11
C. The Nebulous "Full Awareness" Standard Adopted By The USDA Expressly Contradicts The Agency's Own Regulations	14
II. THE DECISION BELOW CONFLICTS WITH THE SPECIFIC PRINCIPLES ANNOUNCED IN PRIOR COMMERCIAL BRIBERY DECISIONS OF THIS COURT AND THE CIRCUIT COURTS OF APPEAL	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page
Checkosky v. Securities and Exch. Comm'n, 139 F.3d 221 (D.C. Cir. 1998)	16
Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984)	12
Holiday Food Serv., Inc. v. Dep't of Agric., 820 F.2d 1103 (9th Cir. 1987)	19
JSG Trading Corp. v. United States Dep't of Agric., 176 F.3d 536 (D.C. Cir. 1999)	5, 6, 10, 11, 19
JSG Trading Corp. v. United States Dep't of Agric., 235 F.3d 608 (D.C. Cir. 2001) (all cites are to Petitioner's Appendix)	4, 7, 11,13, 14, 15, 17
National Beef Packing Co. v. Secretary of Agric., 605 F.2d 1167 (10th Cir. 1979)	19
Norinsberg v. United States Dep't of Agric., 162 F.3d 1194 (D.C. Cir. 1998)	16
Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988 (4th Cir. 1990)	19
United States v. Schaffer, 183 F.3d 833 (D.C. Cir. 1999), *vacated by pardon in* 240 F.3d 35 (D.C. Cir. 2001)	19
United States v. *Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999)	8, 18
Vitarelli v. Seaton, 359 U.S. 535 (1959)	15

STATUTES AND REGULATIONS	
7 U.S.C. § 499b	5, 10
7 U.S.C. § 499b(4)	*passim*
7 C.F.R. § 46.2(j)	2
7 C.F.R. § 46.2(n)	2
7 C.F.R. § 46.2(o)	2
7 C.F.R. § 46.2(p)	2
7 C.F.R. § 46.2(q)	2

TABLE OF AUTHORITIES—continued

Page

7 C.F.R. § 46.2(hh) 7, 14, 15
7 C.F.R. § 46.2(ii) 2
7 C.F.R. § 46.27(a) 2, 8, 15
7 C.F.R. § 46.27(b) 2, 8, 15
Amendments to the Perishable Agricultural Commodities Act ("PACA"), 62 Fed. Reg. 15083 (Mar. 31, 1997) 4, 14

ADMINISTRATIVE DECISIONS

Alkop Farms, Inc. v. Frupac Int'l Corp., 50 Agric. Dec. 1901 (1991) 12, 13
In re Goodman and Co., Inc., 49 Agric. Dec. 1169 (1990) 6
In re J.S.G. Trading Corp., 56 Agric. Dec. 1800 (1997) 5
In re J.S.G. Trading Corp., 57 Agric. Dec. 640 (1998) 5
In re J.S.G. Trading Corp., 58 Agric. Dec. 1041 (1999) (all cites are to Petitioner's Appendix)... 6
R.B. Todd Prod. Co. v. Frostreat Frozen Foods, 22 Agric. Dec. 917 (1963) 13
In re Tipco, Inc., 50 Agric. Dec. 871 (1991) 5, 6

LEGISLATIVE HISTORY

H.R. Rep. No. 104-207 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453 ..... 10, 13

OTHER AUTHORITIES

About FDI (visited Aug. 9, 2001) <http://www.fdi.org/abtfdi/abtfdi.html> 2
Agricultural Mktg. Serv., U.S. Dep't of Agric., *PACA Fact Finder* (last modified Apr. 2000) <http://www.ams.usda.gov/fvpaca/FactFinder.html> 2

TABLE OF AUTHORITIES – continued

Page

Economic Research Serv., U.S. Dep't of Agric., Agric. Econ. Rep. No. 795, *U.S. Fresh Fruit and Vegetable Marketing: Emerging Trade Practices, Trends, and Issues* (Jan. 2001)..... 3

IN THE

Supreme Court of the United States

No. 01-123

JSG TRADING CORPORATION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF FOOD DISTRIBUTORS INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

This brief of Food Distributors International ("FDI") is filed with the consent of the parties, with the letters expressing consent having been filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE[1]

FDI is a national trade association comprised of food distribution companies that supply and service independent grocers and foodservice operations throughout the United

[1] This brief was not written, in whole or in part, by counsel for any party to this proceeding. Pursuant to Rule 37.6, Sysco Corporation, a member of *amicus curiae* FDI, discloses that it has contributed monetarily to the preparation and submission of this brief.

States, Canada and 19 other countries. FDI has 220 members, ranging from small independent companies to Fortune 500 corporations, that operate 997 distribution centers and contribute $183 billion in annual sales to the economy, a significant portion of which is attributed to perishable produce. *See About FDI* (visited Aug. 9, 2001) <http://www.fdi.org/abtfdi/abtfdi.html>. Thus, a vast majority of FDI's members are licensees under the Perishable Agricultural Commodities Act of 1930 ("PACA") and nearly all of FDI's members are regulated by PACA.

The United States Department of Agriculture ("USDA") oversees the administration of PACA and, accordingly, regulates the $100 billion perishable agricultural commodities industry (sometimes referred to as "the industry"). The USDA has described the industry as "unique," because "a 1 or 2-day delay in marketing can mean the difference between profit and loss." *See* Agricultural Mktg. Serv., U.S. Dep't of Agric., *PACA Fact Finder* (last modified Apr. 2000) <http://www.ams.usda.gov/fvpaca/FactFinder.html>. Amplifying these inherent time pressures, the distribution chain from farm to consumer normally involves a variety of transactions between multiple parties, including growers, growers' agents, shippers, dealers, grocery and foodservice wholesalers and distributors, and retailers. *See* 7 C.F.R. §§ 46.2(j), (n)-(q) and (ii). Moreover, the buyers and sellers at points of distribution frequently are undisclosed, at least to each other, *see* 7 C.F.R. §§ 46.27(a)-(b), leaving purchasing agents and brokers with the primary role of mitigating the risks associated with sales or consignments of perishable produce. Purchasing agent transactions, which must be consummated quickly and often are memorialized by nothing more than a handshake, also routinely occur in the early morning hours to ensure that fresh produce is available when grocery stores, restaurants, schools and other mass feeders open at 6:00 or 6:30 a.m.

With the extraordinary level of trust placed in the hands of purchasing agents and brokers, PACA sellers (and FDI

members) historically have relied on goodwill efforts, including off-invoice agreements, to foster business relationships and hedge risk. As a recent report issued by the USDA's Economic Research Service acknowledges, it is standard industry practice to provide purchasing agents and buyers with any combination of volume incentives, earned-income credits, promotional allowances, rebates, free product discounts, buy-backs of unsold product, storage and slotting fees, and capital improvement fees. *See* Economic Research Serv., U.S. Dep't of Agric., Agric. Econ. Rep. No. 795, *U.S. Fresh Fruit and Vegetable Marketing: Emerging Trade Practices, Trends, and Issues* at (vi)-(vii), 27 (Jan. 2001). These off-invoice transactions often are provided as last-minute concessions, depending on the need to move produce that may be marketable only for a very limited time.

As one illustration of the good faith, legitimate business purpose of off-invoice transactions, consider the following scenario commonly faced by PACA licensees: A seller seeks to provide a purchasing agent with marginal boxes of avocados that will be difficult to sell under any circumstances, and impossible to sell if any significant amount of time lapses. Under normal market conditions, the purchasing agent would reject the avocados on behalf of the prospective buyer, leaving the seller with the loss. As an inducement to move the avocados closer to market, the seller proposes an off-invoice incentive, such as a rebate or an enhanced volume discount, to hedge, in whole or in part, the risk if the buyer later sustains a loss. The avocados then are accepted by the purchasing agent without any increase in the price paid by the buyer or the consumer. All concerned parties are better off and the marketplace works as it should.

After the USDA first interpreted PACA to implicitly prohibit commercial bribery, FDI and other interested trade associations mobilized to distinguish off-invoice transactions, which have been an essential component of the industry since well before the inception of PACA in 1930, from acts of

commercial bribery. *See* Amendments to the Perishable Agricultural Commodities Act (PACA), 62 Fed. Reg. 15083, 15084 (Mar. 31, 1997) (codified at 7 C.F.R. pt. 46). In 1995, Congress responded by codifying the legality of good faith "collateral fees and expenses." 7 U.S.C. § 499b(4) ("section 2(4)"). Now, the USDA, as authorized by the Court of Appeals in *JSG Trading Corporation v. United States Department of Agriculture*, 235 F.3d 608 (D.C. Cir. 2001) ("*JSG Trading II*"), has attacked the continued viability of collateral fees and other off-invoice transactions despite the plain intent of Congress, as best reflected in the language of section 2(4). Indeed, if business continues "as usual" and in a manner considered legal for 71 years, many FDI members and other PACA participants may lose the licenses that allow them to participate in the marketplaces of our nation.

With respect to the specific proceedings below, JSG Trading Corporation ("JSG") has never been a member of, and has not otherwise been affiliated with, FDI. Accordingly, the particular facts of the underlying proceedings, including whether any acts of commercial bribery actually occurred, are not why FDI has joined these proceedings as *amicus curiae*. Instead, FDI is concerned that the decision in *JSG Trading II*, if left unaddressed by this Court, will materially disrupt the everyday business practices of the perishable agricultural commodities industry and invite standardless investigations contrary to the industry's reasonable expectations as defined by PACA and the regulations thereunder.[2]

STATEMENT OF THE CASE

FDI's paramount concern over leaving the USDA with unfettered discretion in license revocation enforcement

---

[2] FDI also incorporates by reference Section A of the Statement of the Case of the Petition for Certiorari filed by JSG, which further demonstrates the critical importance of this matter to all participants in the perishable agricultural commodities industry.

actions is no better demonstrated than by a brief discussion of the ever-changing "standards" applied in the proceedings below. In 1993, the USDA brought commercial bribery charges against JSG pursuant to the following language within section 2(4):

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> . . .
>
> (4) . . . to fail without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction.

7 U.S.C. §§ 499b and 499b(4). Without identifying a single transaction that JSG specifically attempted to influence, the USDA argued that any payment exceeding a *de minimis* value made to a purchasing agent constituted a *per se* violation of PACA's implied prohibition against commercial bribery. *In re J.S.G. Trading Corp.*, 56 Agric. Dec. 1800, 1813 (1997), *aff'd*, 57 Agric. Dec. 640 (1998), *remanded by JSG Trading Corp. v. United States Dep't of Agric.*, 176 F.3d 536 (D.C. Cir. 1999). Thus, the USDA took the position that *any* payment or tangible item, other than the most trivial,[3] made or offered by a PACA licensee with the general intent to promote business could support a license revocation action pursuant to section 2(4).

On appeal, the District of Columbia Circuit reversed and remanded, holding that the *per se* test adopted by the USDA "deviate[d] dramatically from the standard test for commercial bribery" employed in two prior USDA decisions. *JSG Trading Corp. v. United States Dep't of Agric.*, 176 F.3d

---

[3] Demonstrating the virtually unlimited reach of this test, the USDA has categorized a *de minimis* payment as "a pen, calendar or lighter." *In re J.S.G. Trading Corp.*, 56 Agric. Dec. at 1813 (citing to *In re Tipco, Inc.*, 50 Agric. Dec. 871, 882-883 (1990)).

536, 544 (D.C. Cir. 1999) ("*JSG Trading I*") (citing *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991) and *In re Goodman and Co., Inc.*, 49 Agric. Dec. 1169 (1990)). When describing the "standard test for commercial bribery," the District of Columbia Circuit correctly removed goodwill business practices from the ambit of section 2(4), requiring instead that "[a]n agreement . . . exist between the payor and the recipient that there will be a *quid pro quo*." *JSG Trading I*, 176 F.3d at 545. Moreover, the Court explicitly acknowledged that the 1995 amendments to PACA confirmed the legality of good faith collateral fees, promotional allowances and rebates. *Id.* at 546. With this recognition, the District of Columbia Circuit instructed the USDA to announce and apply a standard for commercial bribery "in conjunction with the 1995 amendment[s] to PACA." *Id.*

After remand, the USDA purportedly abandoned its *per se* test, instead focusing on: (1) whether or not the payment or offer of payment was made with the general intent to induce business; and (2) whether or not the purchasing agent's "principal" or "employer" was "fully aware" of the payment or offer of payment. *See* Pet. App. at 28a. When announcing this test, the Judicial Officer did not address the 1995 amendments allowing good faith collateral fees made for the purpose of generating business. Instead, the Judicial Officer summarily stated that the payments at issue could not have been made in "good faith" because they were not fully disclosed. *See id.* at 78a. Therefore, in addition to changing its initial approach to commercial bribery, the USDA, through its Judicial Officer, ignored the instructions set forth in *JSG Trading I* by failing to account for the 1995 amendments to PACA.

On appeal, a different panel of the District of Columbia Circuit affirmed the new and "more formalized" test announced by the Judicial Officer. In so doing, the Court of Appeals acknowledged that the USDA applied vacillating standards to commercial bribery, but nevertheless held that

the agency must be given considerable deference when interpreting PACA. Pet. App. at 10a n.8. Without even addressing the business practices unique to the perishable agricultural commodities industry or meaningfully discussing the 1995 amendments to PACA, the Court of Appeals left the industry with two grim realities:

- First, the USDA may bring a commercial bribery investigation based on *any* collateral fee, off-invoice transaction or item of hospitality, if greater than a *de minimis* value, regardless of any nexus to a specific transaction. Indeed, the mere speculation that the proposed rebate or opera ticket may lead to business at some point in the distant future is enough to satisfy the general intent element announced by the USDA; and
- Second, the legality of all collateral fees and off-invoice transactions expressly authorized by the 1995 amendments to PACA now is conditioned on the "full awareness" of *all* potential principals and employers of purchasing agents, *regardless* of the more limited disclosure required in USDA's own regulations, *e.g.*, 7 C.F.R. § 46.2(hh), or the practical ability of PACA licensees to provide "full awareness" before their produce rots somewhere along the chain of distribution.

Thus, many business practices considered legal during the first 71 years of PACA and demanded by the unique realities of the industry now may result in a commercial bribery license revocation action brought by the USDA, as authorized by the Court of Appeals in *JSG Trading II*.

SUMMARY OF THE ARGUMENT

By broadly expanding the types of business practices capable of giving rise to commercial bribery under PACA, the decision in *JSG Trading II*, if left undisturbed, will present a Hobson's choice for every grower, distributor and supplier in the $100 billion perishable agricultural commodities industry.

If PACA licensees conduct business as usual and continue to provide the collateral fees and off-invoice transactions necessary to move produce along the chain of distribution and to the consumer, they may face a license revocation action brought by the USDA once a question of full disclosure arises. This question, of course, is inevitable because PACA licensees routinely provide good faith incentives to purchasing agents "on the spot" to move produce that otherwise would perish and often do not know the names of the "principals" or "employers" affiliated with purchasing agents. *See* 7 C.F.R. §§ 46.27(a)-(b).

Alternatively, PACA licensees may reform their longstanding business practices, at considerable costs to the entire industry, and attempt to provide full disclosure of all collateral fees and off-invoice transactions regardless of the realities presented by the movement of produce. Under this scenario, frantic calls, pages and e-mails will be sent to myriad "principals" or "employers" in the early morning hours seeking their consent to *each* off-invoice transaction necessitated by the circumstances. If full disclosure and consent is not possible within *each* fleeting window of opportunity, produce like fragile avocados will rot and losses will mount. Ultimately, the innocent consumer will be left to bear the financial burden of compliance with the wholly unrealistic expectations set by the USDA.

Factoring these equally unpalatable alternatives, this Court may accept review of *JSG Trading II* per the same reasoning that lead to its decision in a recent commercial bribery case, *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999) ("*Sun-Diamond*"). Such review is appropriate because the holding in *JSG Trading II* cannot be reconciled with the plain language of section 2(4), the 1995 amendments to PACA and the regulations thereunder confirming the legality of good faith, off-invoice collateral fees and transactions. The holding in *JSG Trading II* also cannot be reconciled with the principles set forth by this

Court in *Sun-Diamond*, which involved analogous language in the federal gratuities statute. By returning to the actual language of PACA, the well-settled expectations of FDI's members and those of all other participants in the $100 billion perishable agricultural commodities industry may be preserved. Only then may perfectly legal methods of commerce continue without the fear associated with future license revocation actions brought by the USDA under boundless "standards" that even it cannot consistently apply from one hearing to the next, much less from one case to the next.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW, WHICH FLATLY CONTRADICTS THE PLAIN LANGUAGE OF PACA AND THE REGULATIONS THEREUNDER, THREATENS TO MATERIALLY DISRUPT THE PERISHABLE AGRICULTURAL COMMODITIES INDUSTRY.

A. The Plain Language Of PACA And The Regulations Authorizing Collateral Fees Define The Industry's Reasonable Expectations.

Since the enactment of PACA in 1930, participants in the perishable agricultural commodities industry have utilized off-invoice transactions to build business relationships, spread risk and achieve a modicum of certainty in an otherwise perilous industry. Recognizing that losses are inevitable due to the varying quality and perishable nature of produce, off-invoice transactions allow sellers and distributors to bring more produce to consumers within narrow time frames. Not surprisingly, after the USDA issued its first commercial bribery decisions under PACA in 1990 and 1991, FDI and other trade organizations lobbied Congress to confirm the legality of necessary off-invoice transactions. Congress responded by amending section 2(4) of PACA to state: "this

paragraph shall not be considered to make the good faith offer, solicitation, payment or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter." 7 U.S.C. § 499b(4). The Committee Report further clarified that "collateral fees" are considered "separate from invoice fees" and "refer to promotional allowances, rebates, service or material fees paid or provided, directly or indirectly, in connection with the distribution or marketing of perishable agricultural commodities." H.R. Rep. No. 104-207, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457.

With the 1995 amendments to PACA, industry members were able to conduct business with a clear understanding that collateral fees and off-invoice transactions were authorized if made in good faith, *i.e.*, for legitimate business purposes. From the enforcement actions brought by the USDA in *Goodman* and *Tipco*, industry members also should have been aware that section 2(4) prohibited commercial bribery "in connection with" "any [such] transaction" involving a perishable agricultural commodity. *See* 7 U.S.C. §§ 499b and 499b(4). More specifically, industry members should have been aware that conduct like the making of kickback payments tied to each package of produce then sold to unsuspecting buyers at higher prices would support a license revocation action. *See JSG Trading I*, 176 F.3d at 541-42 (summarizing the salient facts in *Goodman* and *Tipco*).

Thus, a clear line in the sand was drawn. On one side, conduct specifically designed to corrupt a transaction (and disrupt market forces to the ultimate detriment of the consumer) would support a commercial bribery enforcement action pursuant to section 2(4). On the other side, statutorily authorized collateral fees and off-invoice transactions, and general goodwill practices, like taking a business partner out to a nice meal or to a Redskins-Cowboys game, would fall outside of the USDA's prosecutorial reach. Now, without any statutory support whatsoever and with the blessing of the Court of Appeals in *JSG Trading II*, the USDA has

obfuscated this once clear line of demarcation and undermined the well-settled expectations of all members participating in the industry without even providing the opportunity for notice and comment.

B. Violations Of Section 2(4) Require A Nexus To Specific Transactions And Cannot Be Predicated On The General Intent To Foster Business Interests.

After the USDA initially attempted to apply a *per se* test to all off-invoice payments above a *de minimis* level, regardless of any nexus to a specific transaction, the District of Columbia Circuit rejected this "far-fetched notion[ ] of commercial bribery." *JSG Trading I*, 176 F.3d at 544. Acknowledging that all acts are in some way designed to promote business and curry favor, the District of Columbia Circuit required the USDA to make specific findings of the "intent to induce" within a *quid pro quo* arrangement. *Id.* at 545. In so holding, the District of Columbia Circuit attempted to preserve the well-settled expectations of the industry, as confirmed by the 1995 amendments to PACA. *See id.* at 545-56 (refusing to find commercial bribery within traditional business promotional efforts).

In *JSG Trading II*, however, the Court of Appeals rewrote PACA by bringing good faith collateral fees, off-invoice transactions and traditional goodwill practices under the umbrella of commercial bribery. After discussing the ample precedent requiring a nexus between the payment and a specific transaction, the Court of Appeals held that mere generalized intent to induce business is enough to support a PACA violation "given the substantial ambiguity in [section 2(4)]." *See* Pet. App. at 10a & n.8. Under the philosophy of deference to the agency, the Court of Appeals stated that the USDA was authorized to categorize "[s]ocial hospitality" and "[p]romotional allowances, rebates and the like" as bribes, absent full disclosure, because such acts are designed to induce business. *Id.* at 10a-11a.

When the Court of Appeals deferred to the USDA's expansive definition of commercial bribery, it ignored the initial question presented in all agency construction cases. Although deference is a default rule, assuming the agency acted within the permissible confines of the statute, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). As Congress defined the boundaries of the implied duty language in section 2(4), the Court of Appeals in *JSG Trading II* was required to reject the USDA's expansive definition of commercial bribery and end the inquiry.

While it is clear that commercial bribery is a PACA violation, the specific language of section 2(4) mandates that the failure "to perform any specification or duty, express or implied" must arise out of "any undertaking *in connection with any such transaction*." 7 U.S.C. § 499b(4) (emphasis added). The phrase "any such transaction" refers to:

> [A]ny transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker.

Id. When this language is read alone or in conjunction with the USDA's own precedent, only one reasonable conclusion may be reached—Congress plainly intended to limit section 2(4) to the context of actual transactions, like the *quid pro quo* kickbacks at issue in *Goodman* and *Tipco*. Otherwise, the words "any undertaking in connection with any such transaction," words previously considered jurisdictional by the USDA, impermissibly are rendered nugatory. *See Alkop Farms, Inc. v. Frupac Int'l Corp.*, 50 Agric. Dec. 1901, 1920-

21 (1991) (dismissing a portion of a section 2(4) complaint for lack of jurisdiction because trays of kiwifruit held in storage were not part of a defined "transaction"); *R.B. Todd Prod. Co. v. Frostreat Frozen Foods*, 22 Agric. Dec. 917, 920-21 (1963) (defining "transactions" that predicate jurisdiction as "consignments and purchases and sales"). As Congress chose to include these words in section 2(4), and later passed the 1995 amendments confirming the legal status of collateral fees and other off-invoice transactions, the USDA and the Court of Appeals must be held to interpret PACA as written.

More than a mere technical exercise, this critical error in statutory construction frustrates the purpose of section 2(4) and the 1995 amendments thereto. Safely assuming that all collateral fees (and other off-invoice transactions) are made for the general purpose of promoting business interests, every fee greater than a *de minimis* value, regardless of whether connected to a transaction, conceivably may lead to an enforcement action once a lapse in disclosure occurs. Whether the fee is made in "good faith" for a legitimate business purpose and is expressly authorized by Congress[4] is irrelevant under the USDA's new commercial bribery test, as described by the Court of Appeals. *See* Pet. App. at 10a-11a. Now all promotional allowances, rebates, sales incentives and acts of social hospitality, other than the providing of *de minimis* pens, calendars, cigarette lighters and the like, must be cleared in advance or else. While this "white gloves" standard may be the subject of academic discussion, it ignores general business reality, the unique considerations associated with distributing produce and, most importantly, the balance struck by Congress as best reflected in its own words. Unless

---

[4] *E.g.*, "[A] promotional allowance, rebate, service or material fee paid or provided, directly or indirectly, in connection with the distribution or marketing of perishable agricultural commodities." H.R. Rep. No. 104-207, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457.

this Court provides clarity in the wake of *JSG Trading II*, all industry members, including the 220 members of FDI that contribute $183 billion to the economy, no longer will be able to sell and distribute produce according to their well-settled expectations.

C. The Nebulous "Full Awareness" Standard Adopted By The USDA Expressly Contradicts The Agency's Own Regulations.

After erasing the "in connection with any such transaction" language right out of section 2(4), the USDA and the Court of Appeals also added qualifying language to Congress' express authorization of collateral fees. While PACA does not state that collateral fees are made in "good faith" only if the buyer is made "fully aware" of said fees, the Court of Appeals held that "payments intended to induce the buyer's agents or employees to purchase produce are commercial bribes unless the payee's principal or employer is fully aware of the transaction." *See* Pet. App. at 9a. The Court of Appeals also implied, without expressly holding, that "without an affirmative grant of consent by the payee's principal or employer the secrecy element [of commercial bribery] would be satisfied." *See id.* Even if this amorphous disclosure standard were capable of being understood, *see infra* at pp. 15-16, it cannot withstand scrutiny in the light of the USDA's own regulations governing collateral fees.

In connection with the 1995 amendments to PACA, FDI and other trade associations requested notice and comment regarding the extent of the disclosure of collateral fees and other off-invoice transactions required by the USDA. *See* Amendments to the Perishable Agricultural Commodities Act (PACA), 62 Fed. Reg. 15083, 15084 (Mar. 31, 1997) (codified at 7 C.F.R. pt. 46). The USDA responded by issuing a rule stating that "collateral fees and expenses" must be disclosed to "all other parties to the transaction" only when they "affect a material term of the agreement," such as the price to be paid by the buyer for the produce. *See* 7 C.F.R.

§ 46.2(hh). Having limited disclosure to certain collateral fees only, the USDA, through decisions of its Judicial Officers, cannot rewrite this rule to require "full awareness" disclosure of all off-invoice transactions that exceed a *de minimis* value regardless of whether they implicate a material term of the agreement. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959).

Furthermore, the USDA has acknowledged that, in many circumstances, purchasing agents and brokers are given blanket authority to negotiate for buyers "not known to the seller." 7 C.F.R. §§ 46.27(a)-(b). Accepting the USDA's new disclosure standard on its face, sellers and distributors now must take the necessary time to make unknown "principal[s]" or "employer[s]" of unknown buyers "fully aware" of all collateral fees and off-invoice transactions before consummating sales and consignments, *see* Pet. App. at 9a, while their produce loses value as the minutes, hours and, perhaps, days pass. Moreover, PACA licensees are left with no guidance as to the meaning of the operative terms "purchasing agent," "principal," "employer" and "fully aware" within this unforgiving disclosure requirement.

For example, the following questions, among others, remain unanswered:

- What exactly must be disclosed to satisfy the "fully aware" standard (*e.g.*, the amount of the fee, a description of the facts of the sale, the business justification for the fee, any subsequent changes to projected cost, or all of the above)?
- Is it sufficient to disclose the collateral fee to a store manager, a regional vice president, the chief executive officer, or the board of directors, or all of them?
- Is consent of the "principal" or "employer" required?
- If a buyer is *de facto* controlled by other corporate entities, including international entities wherein translators may be required to provide consent before a

box of avocados may be sold, is consent required from all such entities, if any?

- What happens if consent, if required, is initially provided but later is overruled by a higher-ranking official of the "principal" or "employer"?
- Are after-the-fact awareness and consent sufficient, assuming that consent is required and that a seller or distributor is willing to take the risk that the principal or employer may withhold consent?
- Does abiding by a habitual course of conduct among the same PACA licensees amount to full awareness even if actual knowledge is not imparted before every transaction is consummated?

As these very real questions illustrate, the USDA's definition of commercial bribery fails to meet the required "intelligible decisional standard" because it ignores the practical considerations presented by the sale and distribution of produce. *See Checkosky v. Securities and Exch. Comm'n*, 139 F.3d 221, 224 (D.C. Cir. 1998) (holding that a vague mental intent "standard" susceptible to varying interpretations does not provide sufficient direction to regulated persons); *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194, 1199-1200 (D.C. Cir. 1998) (holding that the USDA's "actively involved" standard was too vague for the purposes of defining the term "reasonably connected" contained in the license restriction sections of PACA).

If this Court does not address the USDA's standardless definition of commercial bribery, members of the industry inevitably will treat the "full awareness" requirement differently, leaving the USDA with myriad opportunities to pursue license revocation actions. Not only will the specific purpose of the 1995 amendments be frustrated, numerous lawsuits and due process challenges will follow, leaving the industry in a state of hopeless confusion. More importantly, avocados and the like will rot in marketplaces while sellers

and distributors scramble to secure consent from undisclosed principals or employers of undisclosed buyers. Assuming that normal market forces hold true, consumers will bear the burden of paying higher prices for the short supply of avocados and the like that actually reach them in an edible condition.

II. THE DECISION BELOW CONFLICTS WITH THE SPECIFIC PRINCIPLES ANNOUNCED IN PRIOR COMMERCIAL BRIBERY DECISIONS OF THIS COURT AND THE CIRCUIT COURTS OF APPEAL.

In addition to presenting a matter of great importance to members of the industry and, ultimately, to all consumers of perishable produce, the *JSG Trading II* decision demands review because it conflicts with the specific principles set forth by this Court in *Sun-Diamond*. The *JSG Trading II* decision also conflicts with the consistent reasoning of the circuit courts of appeal when interpreting analogous commercial bribery statutes. In its haste to defer to the USDA, the Court of Appeals ignored established precedent that should have governed its construction of section 2(4).

As discussed in section I.B. *supra*, PACA requires a nexus between a transaction and an allegedly improper payment before commercial bribery may be established in violation of section 2(4). This conclusion was reinforced in *JSG Trading I*, a decision that even the Court of Appeals in *JSG Trading II* described as "elliptically suggest[ing] [that] a *quid pro quo* element" would restore the reasonable expectations of the industry. *See* Pet. App. at 9a. Furthermore, the Court of Appeals also recognized that this Court "required a *quid pro quo*" in *Sun-Diamond*, but purported to distinguish *Sun-Diamond* on the basis that a different statute was under review. This cursory analysis cannot suffice to avoid the clear conflict between *JSG Trading II* and established commercial bribery precedent, as well as precedent of this Court.

When reviewing the federal gratuities statute, 18 U.S.C. § 201 *et seq.*, this Court held that bribery must be linked to a specific official act, and not mere generalized intent to influence an official in his or her position of authority. *Sun-Diamond*, 526 U.S. at 406-10. Focusing on the language "for or because of any official act performed by such public official," this Court rejected the government's position that the general motivation to "build a reservoir of goodwill" and influence the "capacity to exercise governmental power" amounted to bribery in violation of 18 U.S.C. § 201(c)(1)(A). *Id.* at 405-06. Relying on the words chosen by Congress, this Court held that "[t]he insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some particular official act be identified and proved." *Id.* at 406. Relying on common sense, this Court stated that the more natural (and more specific) meaning of the words "official act" was necessary "because of the peculiar results that the Government's alternative reading would produce." *Id.* After reciting the many goodwill acts that would be rendered illegal under the government's expansive construction of the federal gratuities statute, including the giving of replica jerseys and complimentary lunches, this Court stated:

> Thus, when the violation is linked to a particular 'official act,' it is possible to eliminate the absurdities *through the definition of that term.* When, however, no particular 'official act' need be identified and the giving of gifts by reason of the recipient's mere tenure in office constitutes a violation, nothing but the Government's discretion prevents the foregoing examples from being prosecuted.

Id. at 408 (emphasis in original). Choosing to leave the government with a "scalpel," instead of a "meat axe," this Court gave meaning to the words "official act" by requiring that illegal gratuities prosecutions are based on targeted prohibitions, not unfettered discretion. *Id.* at 412.

For the same reasons, the circuit courts of appeal and the USDA, in all decisions prior to *JSG Trading II*, have held that commercial bribery requires a nexus between payment (or the offer of payment) and a concrete "act" or "transaction" specified in the statute at issue. *E.g.*, *JSG Trading I*, 176 F.3d at 545-46 (interpreting PACA to require *quid pro quo*); *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 993 (4th Cir. 1990) (refusing to find commercial bribery under the Robinson-Patman Act without a relationship that connects purchasing decisions to the payments at issue); *Holiday Food Serv., Inc. v. Dep't of Agric.*, 820 F.2d 1103, 1105 (9th Cir. 1987) (finding a *quid pro quo* nexus to support commercial bribery under the Packers and Stockyards Act); *National Beef Packing Co. v. Secretary of Agric.*, 605 F.2d 1167, 1168 (10th Cir. 1979) (identifying the *quid pro quo* nexus for a commercial bribery violation under the Packers and Stockyards Act). *See also United States v. Schaffer*, 183 F.3d 833, 840-46 & 846 n.14 (D.C. Cir. 1999), *vacated by pardon in* 240 F.3d 35 (D.C. Cir. 2001) (interpreting the federal gratuities statute and the more expansive Meat Inspection Act based on the interpretative methods announced in *Sun-Diamond*). Having recognized the importance of *Sun-Diamond* when construing the Meat Inspection Act, the District of Columbia Circuit cannot do an about-face solely because *Sun-Diamond* interpreted a statute "containing . . . different language than PACA." The critical question avoided by the Court of Appeals in *JSG Trading II* is whether the reasoning in *Sun-Diamond* and similar commercial bribery cases applies to the language chosen by Congress in PACA.

Clearly comparable to this Court's analysis of the "official act" language in the federal gratuities statute, violations of section 2(4) must be connected to PACA "transactions," *i.e.*, consignments, purchases or sales of perishable agricultural commodities. *See supra* at pp. 11-14. When the precise language of section 2(4)—"undertaking in connection with

any such transaction"—is read alone or in conjunction with Congress' express authorization of good faith collateral fees and off-invoice transactions without further qualification, the principles in *Sun-Diamond* simply cannot be ignored. By choosing exact language instead of broadly prophylactic language, Congress demonstrated its plain intent to give the USDA a "scalpel" and not a "meat axe," at least relative to enforcement actions involving collateral fees and other off-invoice transactions. Otherwise, the USDA would be left with boundless discretion to initiate revocation actions against PACA licensees once something more than a pen, calendar or cigarette lighter is offered to a purchasing agent or broker without full disclosure to all principals and employers. On behalf of 220 members of the perishable agricultural commodities industry that contribute billions of dollars to the economy, FDI respectfully contends that this result cannot be allowed to stand.

CONCLUSION

For any or all of the foregoing reasons, FDI respectfully contends that the petition for certiorari should be granted.

Respectfully submitted,

ALLEN I. HIRSCH*
HENRY M. PERLOWSKI
MICHAELEEN EARLE CROWELL
ARNALL GOLDEN GREGORY LLP
2800 One Atlantic Center
1201 W. Peachtree Street, N.E.
Atlanta, GA 30309-1450
(404) 873-8500

* Counsel of Record

Counsel for Amicus Curiae

September 19, 2001

(4)

No. 01-123

Supreme Court, U.S.
FILED
OCT 2 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JSG TRADING CORPORATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

ROBERT M. ADLER
JOHN M. HIMMELBERG
O'CONNOR & HANNAN, L.L.P.
1666 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 887-1400

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
JOAN M. MACAULAY
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

October 2, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

15pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF OF PETITIONER	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 4
Christensen v. *Harris County*, 529 U.S. 576 (2000) 7
FEC v. *Akins*, 524 U.S. 11 (1998) 10
JSG Trading Corp. v. *USDA*, 176 F.3d 536 (D.C. Cir. 1999) 5
Rothenberg v. *H. Rothstein & Sons*, 183 F.2d 524 (3d Cir. 1950) 5
Sid Goodman & Co. v. *United States*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991) 5
United States v. *Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999) 3

STATUTES AND REGULATIONS

7 U.S.C. § 499a(b)(13) 6, 7
§ 499b(4) 1, 2, 3, 6
§ 499h 9
7 C.F.R. § 46.27 7
§ 46.2(hh) 2, 6, 9
Amendments to the Perishable Agricultural Commodities Act (PACA), 62 Fed. Reg. 15083 (Mar. 31, 1997) 6, 8

ADMINISTRATIVE DECISIONS

Produce Distribs., Inc., 58 Agric. Dec. 506 (1999), *aff'd*, 199 F.3d 1323 (2d Cir. 1999), *cert. denied*, 531 U.S. 928 (2000) 5
Sid Goodman & Co., 49 Agric. Dec. 1169 (1990), *aff'd*, 945 F.2d 398 (4th Cir. 1991) 4
Tipco, Inc., 50 Agric. Dec. 871 (1991), *aff'd*, 953 F.2d 639 (4th Cir. 1992) 5

TABLE OF AUTHORITIES

OTHER AUTHORITY — Page

Economic Research Serv., U.S. Dep't of Agric., Agric. Econ. Rep. No. 795, *U.S. Fresh Fruit and Vegetable Marketing: Emerging Trade Practices, Trends, and Issues* (Jan. 2001) 7

REPLY BRIEF OF PETITIONER

In this case, the court of appeals upheld the ruling of the United States Department of Agriculture ("USDA") that the Perishable Agricultural Commodities Act ("PACA") prohibits *any* nontrivial payment to a buyer to induce the purchase of produce if the buyer's employer or principal is not "fully aware" of the payment. This strict rule applies even if the payment is unconnected to any specific transaction, is simply intended to cultivate a business relationship, and is made in good faith. Respondent does not even attempt to defend the agency's putative "commercial bribery" standard as consistent with PACA's express requirement that any alleged violation must be "in connection with [a] transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce." See 7 U.S.C. § 499b(4). Rather, respondent asks this Court to uphold the agency's interpretation of PACA so long as it is consistent with past agency precedent. Not only is its approach to statutory construction untenable, but the agency's new rule flatly conflicts with its commercial bribery precedent, which was expressly based on PACA's transactional nexus requirement and prohibited secretive payments in the form of a *quid pro quo* that would subvert the agent's fiduciary duty of loyalty to the principal in that transaction.

More fundamentally, Congress amended PACA in 1995 to clarify the scope of commercial bribery under the statute by declaring *all* "good faith" collateral payments in connection with a perishable agricultural commodities transaction to be lawful. Respondent never explains how, in the wake of the 1995 amendments, a collateral payment may violate PACA without a determination of whether that payment was in "good faith." See Pet. App. 77a. It also never explains how the agency can create by adjudication a blanket rule that all nontrivial gifts or payments to an agent must be fully disclosed to the principal when its own regulations only

require disclosure when the payments "affect a material term of the agreement," see 7 C.F.R. § 46.2(hh).

The agency's infidelity to the statute, its regulations, and its precedents in its zeal to revoke petitioner's license is breathtaking. The injustice and arbitrariness of the agency's actions alone warrant certiorari, but more critical is the devastating uncertainty and disruption within the perishable agricultural commodities industry created by the agency's elimination of the distinction between commercial bribes and legitimate promotional activities that are necessary and commonplace within this industry. A major trade group, Food Distributors International ("FDI"), which has no stake in the outcome of this case, see Brief of Food Distributors International as *Amicus Curiae* 3-4 (hereinafter "*Amicus* Br."), has represented to this Court that the agency's new rule destroys settled expectations in the industry, and gives the licensee a Hobson's choice to either abandon routine business practices that are necessary to hedge risk and ensure the efficient movement of produce to market, or face license revocation actions if it does not comply with a new and unsupportable standard. *Id.* at 8-9. Licensees thus cannot safely engage in necessary business activities that Congress expressly protected. FDI's description of industry practices and the urgency of its concerns belie respondent's cavalier and inaccurate claim that the agency's standard makes no change in the regulatory regime. This Court should not ignore the disorder in a significant industry that contributes over $100 billion to the economy; it should grant certiorari to restore the regulatory scheme crafted by Congress.

1. Section 2(4) of PACA prohibits unfair trade practices, including the failure "to perform any specification or duty, express or implied," but only if the duty "aris[es] out of any undertaking" that is "in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce." 7 U.S.C. § 499b(4). The agency ignored PACA's transactional-nexus

requirement in defining its broad new standard of commercial bribery, which declares unlawful any gift or payment intended to induce the sale or purchase of produce of which the employer is not fully aware, regardless of any link to a specific transaction. Pet. App. 28a. Upholding this standard, the court of appeals held that even ordinary social hospitality (such as taking an agent to dinner) that licensees routinely extend to cultivate business goodwill and induce the purchase of its products would be commercial bribery if not fully disclosed to the principal. *Id.* at 10a-11a.

This Court held in *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999), that a statutory prohibition of gifts or payments for "an 'official act'" in the federal gratuity statute meant that gratuities to generate goodwill were not covered by the statute. *Id.* at 406. Respondent's rejoinder that *Sun-Diamond* involved a different statute misses the mark. See Opp. 11. The point is that an agency or court cannot dispense with statutory limitations to create a general antigratuity offense. The textual reference to "any transaction" in section 2(4) of PACA cannot meaningfully be distinguished from the requirement that a gift be linked to "any official act" in the federal gratuity statute. See *id.* The parallel language in the two statutes suggests a parallel reading: just as the gratuity statute's "insistence upon an 'official act'" requires "that some particular official act be identified and proved," see 526 U.S. at 406, so too does PACA's insistence upon a "transaction involving any perishable agricultural commodity," see 7 U.S.C. § 499b(4), require proof that the payment is connected to such a transaction. Any other reading of PACA would extend its reach to "'any effort to buy favor or generalized goodwill,'" an interpretation rejected by this Court in *Sun-Diamond*, and one that should be rejected here. See 526 U.S. at 405-06; see also *Amicus* Br. 19.

Conceding that the agency's new commercial bribery standard does not require a transactional nexus, respondent

nonetheless leaps to the conclusion that the agency is free to dispense with such a nexus because "[c]onstruction of the relevant PACA provision . . . is primarily entrusted to the USDA rather than the courts." Opp. 11. That is wrong. Courts determine and enforce the plain meaning of statutes; what is entrusted to the agency is the resolution of statutory ambiguity. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). PACA could not be plainer that the only duties covered are those "arising out of any undertaking in connection with" a perishable agricultural commodities transaction; the USDA lacks the power to fashion implied duties unrelated to specific transactions. Moreover, contrary to its current position, the agency has always considered a transaction nexus to be jurisdictional under PACA. See *Amicus* Br. 12-13. The court of appeals' failure to measure the USDA's standard against the statute was an abdication of judicial responsibility, and is the principal reason for the industry upheaval it has caused.

2. Even if judicial review were limited to ensuring consistency with agency precedent, Opp. 11, the agency's new commercial bribery standard could not stand. Agency precedent was firmly rooted in PACA's transactional-nexus requirement, and thus outlawed as commercial bribery only payments corruptly intended as a *quid pro quo* to induce the agent to favor the offeror in a specific transaction. In *Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), a vendor paid supermarket produce buyers $38,000 and $41,000, respectively, in undisclosed kickbacks of $.25 per box, which were recaptured by marking up the invoices by that amount. *Id.* at 1171, 1173-74, 1180. In finding a violation of PACA, the USDA relied on the statute and its regulations to determine that a PACA licensee must perform express or implied duties "in connection with any transaction handled subject to the Act," *id.* at 1182 (internal quotations omitted), including "avoiding that which is occasionally called 'payola,'" *id.* The Fourth Circuit upheld the *Goodman* rule

because the implied duty clause of section 2(4) applied to "any" duty arising from any undertaking in connection with any transaction, and that language was broad enough to prohibit "kickbacks." *Sid Goodman & Co.* v. *United States*, 945 F.2d 398, 1991 WL 193489, at **3-**4 (4th Cir. 1991) (per curiam) (table); *accord*, *Tipco, Inc.*, 50 Agric. Dec. 871, 882-85 (1991) (same), *aff'd*, 953 F.2d 639 (4th Cir. 1992) (per curiam) (table).

Goodman and *Tipco* thus prohibited secretive payments with the corrupt intent to induce the agent to conduct a produce transaction with them: a *quid pro quo*. This was recognized by a different panel of the District of Columbia Circuit in *JSG I*, which cited authority that commercial bribes require a *quid pro quo*, and likened the "intent to induce" requirement of *Goodman* and *Tipco* to the "'intent to influence'" element of the federal bribery laws, which this Court has long interpreted to require a *quid pro quo*. See *JSG Trading Corp.* v. *USDA*, 176 F.3d 536, 545 (D.C. Cir. 1999) (quoting *Sun-Diamond*, 526 U.S. at 404-05). The agency's new standard is not remotely justifiable as consistent with agency precedent, much less with the statute.[1]

3. If there were any doubt about the scope of *Goodman* and *Tipco*, Congress passed the 1995 PACA Amendments to make clear that "good faith collateral fees and expenses,"

---

[1] The petition also demonstrates that the USDA ignored agency and judicial precedent that state law determines the nature and scope of PACA duties not defined by statute or regulation. Pet. 26-27. Respondent claims that these precedents are limited to matters of state contract law, Opp. 12 n.3, but there is no basis or rationale for that limitation in the cases. *See Rothenberg* v. *H. Rothstein & Sons*, 183 F.2d 524, 526 (3d Cir. 1950) ("Congress did not intend . . . to exclude from this field the operation of such rules of state law as can be applied consistently with the express mandates of the federal act"); *see also Produce Distribs., Inc.*, 58 Agric. Dec. 506, 529 n.5 (1999) (applying New York law to determine the meaning of the term "joint venture" for purposes of section 2(4) liability), *aff'd*, 199 F.3d 1323 (2d Cir. 1999), *cert. denied*, 531 U.S. 928 (2000).

including promotional and marketing fees and expenses, rebates, discounts, and allowances, are fully protected. Reflecting the need efficiently to move highly perishable produce and mitigate the risk caused by these highly perishable commodities, the exemption for collateral fees and expenses was intended to "codif[y] USDA's longstanding position on the lawfulness of such fees under the PACA." Amendments to the Perishable Agricultural Commodities Act (PACA), 62 Fed. Reg. 15083, 15084 (Mar. 31, 1997) (codified at 7 C.F.R. pt. 46). The only qualifications placed on collateral fees and expenses are that they be made in connection with marketing or distributing produce, and in good faith, see 7 U.S.C. §§ 499a(b)(13), 499b(4), and the regulations, adopted at the request of FDI, specify that the term "good faith" requires disclosure of collateral fees and expenses only when they "affect a material term of the agreement," 7 C.F.R. § 46.2(hh).

Even though the 1995 Amendments were passed for the specific purpose of clarifying that good faith promotional fees were not within the ambit of *Goodman* and *Tipco*, *Amicus* Br. 3-4, the USDA has now declared that it will find commercial bribery violations of PACA without regard to whether the payment is within the statutory safe harbor. Pet. App. 77a. The court of appeals erroneously condoned this approach, reasoning that a payment is not in good faith unless fully disclosed to the principal, and paying no heed to the agency's more limited (and unambiguous) "good faith" disclosure regulation. *Id.* at 11a. Thus, under the agency standard approved by the court of appeals, *all* nontrivial promotional and marketing fees and expenses paid to the agent of which the agent's employer or principal was not "fully aware" are commercial bribes.

Respondent makes no effort to defend this unprecedented "full awareness" requirement as consistent with the PACA Amendments or with its "good faith" disclosure regulation

that implements those Amendments.[2] Instead, respondent dismisses this point, countering that the "more salient point . . . is that promotional allowances and rebates are typically given to the customer (though they may be accepted on the customer's behalf by its agent) rather than being directed to the agent for his personal use." Opp. 10. Respondent cites no authority for this proposition, because there is none. To the contrary, the statutory protection for good faith collateral fees and expenses is unqualified. The term "collateral fees and expenses" means "*any* promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity." 7 U.S.C. § 499a(b)(13) (emphasis added). The statute makes *no* distinctions among recipients of such payments. This broadly-worded provision applies to good faith payments to any person involved in a covered transaction, whether the person is a farmer, shipper, repacker, retailer, wholesaler, broker, or an agent of *any* of these individuals.

Likewise, respondent's claim, again made without any legal authority whatsoever, that the "typical" method of inducing sales "is to offer incentives that make the transaction more favorable or attractive *to the customer*" is misleading and flatly inconsistent with the way this industry operates. See Opp. 10. Agents and brokers frequently purchase for, or sell to, numerous customers, often making it impossible for the seller even to know the identities of the actual customers. See 7 C.F.R. § 46.27; see also Economic Research Serv., U.S.

---

[2] The clarity of the regulation as to when disclosure of collateral fees is required is further refutation of the agency's claim that its "full awareness" standard for commercial bribery under section 2(4) is entitled to deference. *See Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000) ("The regulation in this case, however, is not ambiguous . . . . To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

Dep't of Agric., Agric. Econ. Rep. No. 795, *U.S. Fresh Fruit and Vegetable Marketing: Emerging Trade Practices, Trends, and Issues* 9 (Jan. 2001) (defining brokers as "agents that negotiate transactions between buyers and sellers," including transactions in which "shippers were unaware of the final destination of the product").[3] As noted by *amicus*, "buyers and sellers at points of distribution are frequently undisclosed, at least to each other, *see* 7 C.F.R. §§ 46.27(a)-(b), leaving purchasing agents and brokers with the primary role of mitigating the risks associated with sales or consignments of perishable produce." *Amicus* Br. 2.

Moreover, many promotional and marketing activities commonplace in the industry, such as a dinner or tickets to a sporting event, by definition, do not inure to the benefit of the customer – it is the agent who enjoys these perquisites as a method to induce him to transact business with that particular seller. Thus, as is clear from the regulations and industry practice, the types of collateral fees and expenses protected by PACA extend well beyond direct incentives to customers – they encompass all forms of good faith off-invoice arrangements in connection with the distribution or marketing of produce. Respondent's naked claim that promotional payments to middlemen and agents for their own benefit are atypical simply ignores the industry. Not surprisingly, the industry is up in arms over this standard precisely because such payments are commonplace, necessary, and protected by PACA, and because the agency has issued a ruling that transforms standard practice into potential bases for ruinous license revocations. See *Amicus* Br. 8-9.

4. Respondent claims that this case is an unsuitable vehicle for addressing the issues raised in the petition because,

---

[3] Although the term "purchasing agent" does not appear in PACA or its regulations, the USDA considers a "purchaser's agent" to be a broker. Amendments to the Perishable Agricultural Commodities Act (PACA), 62 Fed. Reg. 15083, 15084-85 (Mar. 31, 1997) (codified at 7 C.F.R. pt. 46).

despite its holding that no *quid pro quo* was required and that good faith was not a defense to a commercial bribery charge, the agency stated in the alternative that certain of the challenged payments were intended as a *quid pro quo* and were not in good faith. Pet. App. 9a n.7. Thus, respondent claims the agency would reach the same result under the correct legal standard. Opp. 12-13. That argument is meritless. First, the agency's alternative holding that certain payments by petitioner were not in good faith was based on an error of law that was contrary to its own regulation (namely, that lack of full disclosure proves lack of good faith, see Pet. App. 78a); petitioner is entitled to an adjudication under the correct legal standard.[4] Second, the license revocation was necessarily based on a finding of flagrant and repeated violations. See 7 U.S.C. § 499h. Although petitioner vigorously disputes whether any PACA violation could be found under a proper standard, the elimination of *any* violation would require readjudication of petitioner's license revocation. The government does not even controvert, for example, that certain payments that formed the basis of the revocation decision lacked a nexus to any PACA transaction. See, e.g., Pet. App. 46a-47a ($5,600 payment to Gloria Gentile violates PACA even though unconnected to any transaction). The proper course is for the USDA to conduct a new adjudication of whether any payments violate PACA under a correct legal standard, and then redetermine

---

[4] This means, for example, that the agency would have to make a finding that the challenged payments "affect[ed] a material term of the agreement." *See* 7 C.F.R. § 46.2(hh). In any event, the record demonstrates that if the correct legal standards were applied, no finding of commercial bribery could have been made. For example, there was substantial testimony that the principals knew about the challenged payments to the agents. *E.g.* Tr. 2823 (A. Gentile Test.); Tr. 488-89 (P. Prisco Test.); Tr. 1252-56 (A. Lomoriello Test.); Tr. 2896-97 (L. Beni Test.); JSG Ex. 51 (L. Beni Aff.). This level of knowledge on the part of the principals satisfies agency precedent and is consistent with the requirements of PACA.

whether any violations it might find justify license revocation. This Court does not engage in speculation as to whether the agency will reach the same result once its errors of law are corrected. See *FEC* v. *Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case – even though the agency . . . might later . . . reach the same result for a different reason.").

Contrary to respondent's claims, this case is an ideal vehicle for determining the legal issues raised in the petition; there are no factual or procedural obstacles that would prevent this Court from squarely resolving these issues. Moreover, the critical point is the grave uncertainty the USDA's standard has created in a significant sector of the economy through its blatant disregard of the statute, regulations, and agency precedent. Resolution of this question should not await the emergence of a circuit split. The repercussions of the USDA's unprecedented standard, if not addressed by this Court, will be felt immediately by *all* PACA licensees and other members of the industry who (with the sanction of Congress) depend on collateral fees and expenses to move produce, build relationships, hedge risk, and avoid losses. A decision from this Court clarifying the parameters of section 2(4) is necessary to eliminate the industry disruption created by the USDA and the decision below.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ROBERT M. ADLER
JOHN M. HIMMELBERG
O'CONNOR & HANNAN, L.L.P.
1666 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 887-1400

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
JOAN M. MACAULAY
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

October 2, 2001